

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

i4i LIMITED PARTNERSHIP * Civil Docket No.
* 6:07-CV-113 (LED)
VS. * Tyler, Texas
*
* May 13, 2009
MICROSOFT CORPORATION * 1:30 P.M.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE LEONARD E. DAVIS
UNITED STATES DISTRICT JUDGE
AND A JURY

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(Proceedings recorded by mechanical stenography,
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P R O C E E D I N G S

(Jury out.)

COURTROOM DEPUTY: All rise.

THE COURT: Please be seated.

All right. Mr. Cawley, would you like to offer those exhibits now?

MR. CAWLEY: Yes, Your Honor.

Would the Court like for me to rattle off the ones we're offering or to discuss --

THE COURT: Well, just take them one at a time. However you want to do it is fine.

MR. CAWLEY: Well, it seems to me that the easiest way is not trying to group them --

THE COURT: Okay.

MR. CAWLEY: -- and just sort of offer them. These will be the exhibits that we are offering, and I'll try and group them sort of by issue.

THE COURT: Okay.

MR. CAWLEY: The first is Plaintiff's Exhibit 78. That is an e-mail string from one Microsoft employee to another.

One of the e-mails attaches an article from USA today which contains a quote by a Microsoft employee.

There's an objection there as to hearsay.

1 It is hearsay within hearsay, but both the hearsay and
2 the within hearsay are both statements by a party
3 opponent. So we believe that that's -- we don't believe
4 that's objectionable.

5 THE COURT: Any response?

6 MR. SILVA: I don't have this on the list
7 of exhibits that was presented to us today, so I don't
8 have a response to it right now.

9 THE COURT: What's the -- Exhibit 78?

10 MR. SILVA: Yeah. I have several --
11 yeah, it was Exhibit 78, but I don't see it on my list.

12 THE COURT: Okay. Do you have any
13 objections to it?

14 MR. SILVA: We do have an objection on
15 our list, and I -- and I can't -- I can't address right
16 now whether I withdraw it. I can take a look at the
17 exhibit and do that in a moment, but this was not on the
18 list that they provided us.

19 THE COURT: Okay. Well, we'll let you do
20 that, and we'll go on to the next one.

21 MR. CAWLEY: 144, is that on the list?

22 MR. SILVA: Yeah. We would like to
23 address 144, Your Honor.

24 MR. CAWLEY: Well, 144 is a copy of
25 Microsoft's 10-K that's being offered to show revenues

1 and profits of Office products, obviously, relevant to
2 damages.

3 Microsoft -- we had some dialogue with
4 Microsoft in which they seemed to indicate that they
5 wanted us to somehow limit the entire 10-K down to just
6 the portion we want, which we are willing to do, but we
7 never heard back from them, so at this point, we're
8 offering the whole document.

9 THE COURT: All right.

10 MR. SILVA: Your Honor, we -- the reason
11 why we objected to the exhibit, we asked them to
12 identify what they thought was relevant about it and
13 what they wanted to get in.

14 We view the document as irrelevant, and
15 more importantly, there are portions of the document
16 that are -- would be highly prejudicial and totally
17 irrelevant to any issue in the case.

18 THE COURT: What portions are those?

19 MR. SILVA: And, Chris, if you can pull
20 up the exhibit for us.

21 Specifically, Your Honor, this is a 10-K,
22 so there are portions of the document that relate to
23 past litigations involving Microsoft, including
24 judgments and verdicts. That's precisely the kind of
25 information that Rule 403 was designed to exclude.

1 And I'll ask Chris to pull up --

2 THE COURT: Okay. Which part do you want
3 to put in?

4 MR. SILVA: We want the -- there are
5 sections dealing with their revenues, and we can
6 identify the specific pages for counsel.

7 THE COURT: Okay. Do you have any
8 objection to the pages --

9 MR. SILVA: I have no objection just to
10 revenue numbers, Your Honor.

11 THE COURT: All right. They'll be
12 admitted, the pages dealing with revenue.

13 Y'all should really be able to have this
14 conversation without having to talk through me. It
15 sounds like, you know, if you could just discuss it, you
16 could agree.

17 What's next?

18 MR. CAWLEY: Next is a category, but
19 since the numbers are not necessarily completely
20 inclusive, I'm going to have to read all the numbers.
21 And this first category -- and let me just telegraph a
22 bunch here -- these are all exhibits to the reports of
23 two experts. They're basically schedules, mostly
24 calculations, and so forth.

25 Plaintiff's Exhibit 364, 366, 367, 368,

1 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488,
2 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499,
3 500, 501, 505, 506, 507, 508, 509, 510, 511, 512.

4 Those are all -- as I said, Your Honor,
5 all occurred under Rule 1006 as summaries of voluminous
6 data. They show the calculations based on all kinds of
7 underlying data by Mr. Wagner and Dr. Wecker.

8 THE COURT: Who are your damage experts?

9 MR. CAWLEY: Yes. One of those is the
10 damages expert, and one is sort of an adjunct to
11 damages, which is the survey expert.

12 THE COURT: All right.

13 MR. CAWLEY: Now -- and maybe it will
14 simplify or shorten matters.

15 In addition to that group of documents,
16 there's another set of schedules, which is 631 through
17 641. Those are also schedules from those same expert
18 reports.

19 And the only difference between those and
20 some of the earlier schedules is that this group, 631
21 through 641, has been objected to as not in the expert's
22 timely report, because these are supplements to the
23 report that was delivered to Microsoft about two weeks
24 ago that do nothing more than bring the damages current
25 through the new trial date.

1 The Court will remember this case was
2 continued from its original setting in -- I guess it was
3 early April, so we did a supplement to those schedules
4 to calculate the damages through the date of this trial
5 as opposed to that trial.

6 THE COURT: Okay. All right.

7 MR. SILVA: So, Your Honor, the exhibits
8 actually fall into two categories, so I'd like to break
9 my response into two categories.

10 THE COURT: All right.

11 MR. SILVA: The first category, which
12 related to Exhibits PX364 through 368 relate to
13 attachments to the report of one, Mr. Wecker, who is
14 Plaintiff's survey expert.

15 And our objection to those exhibits is
16 the same objection that we raised in our Daubert. We
17 believe that the survey is not reliable, that it's
18 hearsay, that the survey results were manipulated and
19 changed by Dr. Wecker without disclosing them to us, and
20 for that reason, we move to strike the report.

21 And we'd just like to, again, raise that
22 for the record, so we can preserve it.

23 THE COURT: Okay. That's overruled.

24 MR. SILVA: Okay.

25 THE COURT: What's next?

1 MR. SILVA: The next is the -- the next,
2 as Mr. Cawley said, do relate to schedules attached to
3 Dr. Wagner's report.

4 And our reason for objecting to those is
5 they are not simple compilations of underlying data;
6 they're manipulations of data. They have the expert's
7 own opinions and analyses intertwined in them.

8 We believe they're more properly used as
9 demonstratives, and we have no objection to them being
10 used as demonstratives, but we do object to them being
11 introduced into evidence.

12 THE COURT: Okay. Does that include 631
13 through 641?

14 MR. SILVA: Yeah. Yes. And 631 to 641,
15 just to clarify it, we're not objecting to the
16 supplementary nature of these exhibits; we're objecting
17 to the fact that they're being used on -- offered into
18 evidence rather than just used as demonstratives, which
19 is what we believe they should properly be limited to.

20 THE COURT: Objection's overruled.

21 MR. SILVA: Okay.

22 MR. CAWLEY: Just a couple more, Your
23 Honor.

24 365 is another exhibit to Dr. Wecker's
25 report, but it's not a compilation of data; it is the

1 survey -- the survey script that was used to call
2 respondents to get the survey responses.

3 MR. SILVA: I believe Your Honor has
4 already overruled my objection to that exhibit.

5 THE COURT: Okay.

6 MR. CAWLEY: There are three exhibits,
7 once again, schedules to Mr. Wagner's report. These
8 three also are not compilations of data; they are
9 summaries of license agreements. These are Exhibits
10 502, 503, and 504.

11 We don't insist that these be offered
12 into evidence, but we note that Mr. Ugone, the
13 Defendant's damages expert, also has similar exhibits,
14 so we'd like to either get them both admitted or
15 neither.

16 MR. SILVA: We'd like to use these as
17 demonstratives, and we'd like them to be limited.

18 THE COURT: And you'll use yours as
19 demonstratives as well?

20 MR. SILVA: Correct, Your Honor.

21 MR. CAWLEY: That's acceptable.

22 THE COURT: Okay. I think that's -- they
23 said that was agreeable.

24 MR. CAWLEY: Yes.

25 THE COURT: Glad I could help with that.

1 What else?

2 MR. CAWLEY: That's it.

3 THE COURT: All right. Bring in the
4 jury.

5 MR. CAWLEY: Oh, oh, oh, I'm sorry. Not
6 quite yet.

7 We would like to offer into evidence,
8 again as a summary of voluminous data, a clean copy of
9 the Figure 12 that Dr. Rhyne has already been referring
10 to.

11 To lay the foundation for that, if we
12 need to do it further, the next witness will testify
13 that he printed off approximately 10,000 pages of the
14 source code of Microsoft Word, many of which he used to
15 prepare that summary.

16 That's, obviously, voluminous. It's,
17 obviously, impractical to use in the courtroom. It's,
18 obviously, available to Microsoft, since they own the
19 code. And it's, obviously, relevant to infringement,
20 since this is the instrument that carries out
21 infringement.

22 The second thing we'd like to offer is
23 that we want to take a photograph -- obviously, the
24 Court's told us we'll have to photograph both of these
25 things, just for purposes of managing the size.

1 But we also want to take a photograph of
2 the marked-up exhibit, including the red boxes, as
3 they're currently situated, and offer that as an
4 exhibit.

5 MR. POWERS: Your Honor, if I may, our
6 position is that both are entirely appropriate as
7 illustrative or demonstrative exhibits, and they could
8 be marked in the same way we've done other demonstrative
9 exhibits, but Rule 1006 is not designed for a graphic
10 argumentative statement of an interpretation by an
11 expert of source code.

12 That's a classic demonstrative example --
13 exhibit, and it should be limited to that purpose.

14 THE COURT: All right. All of these
15 objections, I don't know why we're having to take these
16 up outside the presence of the jury. I mean, when I
17 tried lawsuits, I mean, we would object when the
18 evidence is offered.

19 So as far as I'm concerned, all this,
20 just offer it in front of the jury. If you want to
21 object for the record, you can, and I'll rule on it
22 then.

23 MR. CAWLEY: Thank you, Your Honor.

24 THE COURT: All right. Bring the jury
25 in.

1 (Jury in.)

2 THE COURT: Please be seated.

3 All right, Ladies and Gentlemen of the
4 Jury. I hope you had a good lunch and all rested and
5 didn't eat too much, so you don't get sleepy this
6 afternoon. And continue to pay attention, like I know
7 you've been doing.

8 So at this time, we'll proceed. Who will
9 Plaintiffs' next witness be?

10 MR. CAMPBELL: Your Honor, if it's all
11 right with the Court, we'd like to read in a joint
12 stipulation from the pretrial order at this time.

13 THE COURT: All right. Let me explain to
14 the jury what a stipulation is. That's something that
15 both sides have an agreement that they've entered into,
16 and they've stipulated as to specific facts, which you
17 will accept as true, whatever's been stipulated to.

18 So they're going to offer one of the
19 stipulations that's been entered into in this case.

20 MR. CAMPBELL: Plaintiffs and Microsoft
21 makes the following joint stipulation for entry into
22 evidence in this case:

23 (1) Plaintiffs have accused certain
24 specific ways of using Microsoft Word 2003 and 2007 of
25 infringement in this case.

1 (2) Plaintiffs allege that users of Word
2 2003 and 2007 infringe U.S. Patent No. 5,787,449, the
3 '449 patent, when they open certain types of XML
4 documents containing what are known as Custom XML tags.

5 (3) Microsoft denies these allegations.

6 (4) The parties agree that there are many
7 uses of Word 2003 and 2007 that are not accused of
8 infringement, that are not at issue in the case.

9 (5) The parties agree that Word 2003 and
10 Word 2007 may be used without ever using the methods of
11 using Custom XML tags that are accused of infringement.

12 (6) The parties agree that there are ways
13 of using Custom XML tags in Word 2007 and Word 2000 --
14 I'm sorry -- Word 2003 and Word 2007 that are not
15 accused of infringement.

16 (7) The parties further agree that the
17 following acts have been performed by at least one user
18 other than Microsoft itself, hereinafter user of Word
19 2003 or Word 2007, hereafter referred to as Word:

20 A copy of Microsoft's word program was
21 installed on a computer within the United States.

22 A user of the installed Word program used
23 the program to open a document containing content and
24 also containing XML tags that conform to the XML
25 specification as standardized by the Worldwide Web

1 Consortium, W3C, for the XML tags of the open document
2 were not natively exported by the installed Word
3 program, quote, the XML document, unquote.

4 Microsoft generally refers to these XML
5 tags as Custom XML or Arbitrary XML.

6 A custom transform was not applied to the
7 XML documents during the open operation.

8 Furthermore, the XML document was not
9 opened as plain text.

10 The opened XML document was displayed to
11 the user by the installed Word 2003 program's graphical
12 user interface, which displays a graphical
13 representation of the XML document.

14 THE COURT: You might slow down just a
15 little bit for the court reporter.

16 MR. CAMPBELL: Thank you, Your Honor.
17 Sorry about that.

18 The graphical user interface includes the
19 XML structure pane showing the Custom XML elements in
20 the document. The XML structure pane allows a user to
21 choose an element to apply to your current selection.

22 Microsoft further stipulates that the
23 user added or deleted a Custom XML element by the user
24 interface of the installed Word program.

25 (12) The user saved the open XML document

1 in one of the XML file formats supported by Word, and a
2 custom transform was not applied during the save
3 operation.

4 (13) A user has opened an XML document,
5 per paragraphs 9 through 12 of this stipulation, with a
6 schema attached to the XML document.

7 The user has opened the XML document, per
8 Paragraphs 9 through 12 of this stipulation, without a
9 schema attached to the XML document.

10 (14) Microsoft does not stipulate,
11 concede, or suggest that any of the foregoing acts are
12 acts of infringement in this case.

13 THE COURT: Okay. Thank you.

14 MR. CAMPBELL: Thank you, Your Honor.

15 THE COURT: All right. Who will be your
16 next witness?

17 MR. CAMPBELL: Plaintiffs call Dr. David
18 Martin.

19 THE COURT: All right. Mr. David Martin.

20 All right. You may proceed.

21 MR. CAMPBELL: Your Honor, may I
22 approach?

23 THE COURT: Yes, you may.

24 THE WITNESS: Thank you.

25 MR. CAMPBELL: Your Honor, those

1 notebooks are source code. Would you like copies?

2 THE COURT: I don't think so. Thank you.

3 MR. CAMPBELL: May I proceed, Your Honor?

4 THE COURT: Yes, you may.

5 DAVID MARTIN, PLAINTIFFS' WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. CAMPBELL:

8 Q. Good afternoon, sir.

9 A. Good afternoon.

10 Q. Can you please introduce yourself.

11 A. My name is David Martin.

12 Q. And can you briefly explain what you were
13 asked to do in this case?

14 A. Yes, sir. I was asked to analyze the Custom
15 XML feature in Microsoft Word 2003 and 2007 by primarily
16 analyzing the source code.

17 Q. Okay. Let's discuss your qualifications for
18 performing the analysis of the Microsoft Word source
19 code.

20 Can you briefly discuss your educational
21 background?

22 A. Certainly.

23 I studied computer science and mathematics at
24 Iowa State University. I got my undergraduate degree
25 there in 1993. I continued my education by studying

1 computer science at Boston University where I obtained
2 my Ph.D. there in 1999.

3 Q. Have you taught at any universities?

4 A. Yes, sir. I have taught computer science for
5 the past 10 years at multiple computer science
6 departments. I was on the faculty at the University of
7 Denver. I was also on the faculty of the University of
8 Massachusetts Lowell.

9 Q. So did you teach computer science courses?

10 A. Yes, sir, I did.

11 Q. Have you received any awards for your work?

12 A. Yes. I received some teaching awards at the
13 University of Massachusetts Lowell in 2004 and 2007.

14 Q. What work experience do you have in the
15 computer science field.

16 A. I have been working in the software field for
17 30 years now. I have a lot of experience.

18 Q. What kind of work have you done, in the past
19 30 years, in the software field?

20 A. I have done programming work. I've done
21 analysis work. I have led students in research. I've
22 taught courses. I've read books. I've done a lot of --
23 a variety of different things.

24 Q. Very good.

25 Are you a member of any professional

1 societies related to computer science?

2 A. Yes, I am. I'm a member of the ACM, the
3 Association for Computing Machinery. And I joined when
4 I was an undergraduate student in computer science.

5 Q. What is the Association for Computing
6 Machinery?

7 A. It's the professional organization for
8 computer scientists, for people in the software field.
9 It's comparable to the IEEE that Dr. Rhyne mentioned
10 earlier.

11 IEEE is really more for people from
12 electronics engineering, and ACM is specifically for
13 people in the software field.

14 Q. Do you have any experience with XML?

15 A. Yes, I do.

16 Q. What experience do you have with XML?

17 A. I'm remembering a project I worked on in
18 2001, and I worked on this project with a graduate
19 student of mine at the university, and our goal was to
20 run a survey of a number of websites and extract some
21 information from those websites. We had some questions
22 we wanted to answer about these websites.

23 However, the process of getting the
24 information out of the websites took a long time, so we
25 were going to approach this project in two steps.

1 First, we would gather all the information,
2 and that took a long time to do, and then we would
3 separately analyze the information that we obtained
4 through the first step.

5 We used XML in this project, because after
6 running the first step, we needed a way to take the data
7 that we had gathered from the websites and then store it
8 somehow in a way that we could later decide how we were
9 going to analyze it.

10 And indeed later, when we analyzed it, we
11 analyzed it one way, and then we decided we need to look
12 at this data in a different light, and so we analyzed it
13 a second way.

14 We were able to do this because the data
15 produced in the first phase of the project was all
16 labeled indicating the type of data that it was.

17 So in the second phase of the project, when
18 we changed our approach and said we're going to analyze
19 it differently, we could just point to the data in a
20 different way.

21 Q. I believe you mentioned that you were asked
22 to study the operation of Custom XML in Word. Can you
23 describe the work involved with your study of Custom XML
24 in Microsoft Word?

25 A. Yes, sir. As I said, my work was

1 primarily -- my work was primarily studying the source
2 code of Microsoft Word.

3 And of the large amount of source code that
4 constructs this project, I studied 220 different source
5 code files related to the XML support, the Custom XML
6 support, in these two products. These are listed, I
7 guess, as PX454 and 455.

8 I reviewed thousands of pages of that source
9 code. I determined which of the files I needed to look
10 at, and I printed them out. It turned out to be an
11 enormous amount of source code.

12 When I printed it out, it turned out to be 18
13 binders of source code, really longer than I can reach
14 with my arms. And that was just for one of the two
15 versions of the project.

16 So I needed all of this in order to
17 understand the feature and to be able to condense it
18 down into a diagram, such as this that we've seen
19 throughout the trial.

20 I also devoted upwards of 350 hours to
21 studying the source code so that I knew what the data
22 structure in the source code was, and I knew exactly how
23 the various functions that we've been discussing are
24 achieved by the product.

25 Q. You referenced the diagram next to you,

1 Figure 12. Is this a summary of your analysis of the
2 source code?

3 A. Yes, it is. This summarizes the data
4 structure that is part of providing the Custom XML
5 feature in Word 2007.

6 MR. CAMPBELL: Your Honor, Plaintiffs
7 have marked this diagram as PX537 and would offer it
8 into evidence as a summary of the source code.

9 MR. KUDLAC: Renew our objection to this
10 being entered into evidence, other than as an
11 illustrative, because of the argument that was made
12 before.

13 This is -- the source code works as the
14 source code works. This can be used as an illustrative,
15 but to allow this into evidence for how the source code
16 works seems to be misleading. But it can be used as an
17 illustrative.

18 THE COURT: Overruled. Be admitted.

19 Q. (By Mr. Campbell) Dr. Martin, did you also
20 create a diagram to summarize how the Word 2007
21 source code works?

22 A. Yes. I created a similar diagram for Word
23 2003, and I think we'll see it later.

24 MR. CAMPBELL: Your Honor, we've marked
25 the diagram for Word 2003 as PX541, and we'll offer it

1 into evidence as well.

2 THE COURT: Same objection?

3 MR. KUDLAC: Same objection.

4 THE COURT: It will be admitted.

5 MR. CAMPBELL: Thank you.

6 Q. (By Mr. Campbell) Dr. Martin, you mentioned
7 source code. Can you -- and we've heard about source
8 code, but can you briefly describe what is source code?

9 A. Certainly. Source code -- you can think of
10 source code as being like the blueprint for a building.
11 We're all sitting in this courtroom now, and we can
12 experience what the building provides for us.

13 We can experience the lighting and the air
14 conditioning and the heating maybe during certain times
15 of the year, but it doesn't tell you how all of those
16 features come to this room.

17 The blue -- the source code are the
18 blueprints for a product, and they are what an engineer
19 uses to actually build those features into the product.

20 We've seen some examples from source code
21 earlier today, and indeed on the slide, we also have an
22 example of source code. It's not -- it's not source
23 code from this case. This is separate source code.
24 However, source code looks roughly like this.

25 Q. Dr. Martin, did you study anything else

1 besides the source code in performing your analysis?

2 A. Yes, sir. I studied many of the documents.
3 Among them was one called the Word binary file format
4 dot doc structure specification.

5 This is a very large document, and it
6 describes what happens when you use Microsoft Word to
7 create a document, and then you save it to the disk as
8 what's called a doc file. We heard about doc files
9 earlier as well. And this document sets out exactly
10 what needs to be put in that file that makes it a doc
11 file.

12 Q. Why -- why was the binary specification
13 relevant to your analysis?

14 A. It was particularly relevant to my analysis
15 because the doc file format, the way it's written into
16 the file closely matches -- not exactly, but closely
17 matches the structure that is in Word's memory when a
18 user is using the product in order to edit the document.

19 So in a way, the doc file can be seen as a
20 snapshot of a diagram like this or some other diagram
21 that also reflected the data structure.

22 Q. And, Dr. Martin, did you write a report
23 describing your findings relating to Custom XML in
24 Microsoft Word?

25 A. Yes, I did. I wrote a 91-page report. It

1 explains the operation of the Custom XML within
2 Microsoft Word 2003 and 2007.

3 Within this report, I also provided citations
4 to the specific places in the source code that justified
5 my explanations of what the source code was doing.

6 Q. Dr. Martin, do you understand what this
7 lawsuit is about?

8 A. Yes. This is a patent lawsuit.

9 Q. Did you review the patent at issue in this
10 case, the '449 patent, in the preparation of your
11 report?

12 A. No, sir, I did not.

13 Q. Why not?

14 A. The patent is irrelevant to me in
15 understanding how Microsoft Word operates underneath.
16 What I needed to see was the blueprints.

17 The patents aren't the blueprints. They
18 offer no guidance to me about what the blueprints say.
19 So I did not consider the patent in the preparation of
20 my report or the preparation of this diagram.

21 Q. Let's talk a little bit about this diagram.
22 I believe you mentioned already that you drew this
23 diagram?

24 A. That's correct, yes, sir.

25 Q. What is the box there labeled merge

1 structures for display purposes?

2 A. That box provides the support for the Custom
3 XML elements within the current document.

4 Q. Okay. Did you call this something else in
5 your report?

6 A. Yes. In my report, I refer to this as the
7 SDT bookmark table. I don't believe we have -- I don't
8 believe I've heard this name in the trial so far.

9 However, this is the name that I used in my
10 report to describe this table.

11 Q. Why did you call this table merged
12 structures?

13 A. It's called merged, because if you look at
14 the diagram in the top left here -- I can circle it. I
15 can sort of circle it. There.

16 In the top left, it's labeled BMDS. There
17 are three fields on the top that have arrows that point
18 down to the STD bookmark table that we just discussed,
19 okay?

20 And so it's merged in the sense that we have
21 the three top elements from the top box that are going
22 sideways to provide the elements down below. I'm
23 merging them sideways.

24 The merging shows the logical relationship
25 between each one of these elements. And we've seen

1 examples before wherein each row of the table below
2 describes a single Custom XML element in a document.
3 And it says where the element begins in the document and
4 where the element ends in the document and also says
5 what the tag name for that element is.

6 Q. Dr. Martin, if a user adds or deletes a
7 custom XML tag in a document, does Word access all three
8 columns of data?

9 A. Yes, sir. If the user inserts an element
10 into the document, then it must be described in the
11 table somewhere. So let me draw a line somewhere in the
12 table.

13 Let's imagine this is where the element needs
14 to be placed. Word would have to open up space in the
15 table in order to describe that new element. And so it
16 would shift some of the elements in the table around to
17 make room for it.

18 In shifting, it has to visit each column of
19 this table. This is the sense in which they're merged.
20 They all work together to describe a single Custom XML
21 element.

22 Q. Dr. Martin, as a computer scientist, do you
23 consider the SDT bookmark table to be a single data
24 structure?

25 A. Yes, sir, I do.

1 Q. Being a little more specific, do you consider
2 the table containing the CP first, CP limit, and ELMT
3 info columns to be a single data structure?

4 A. I think that's the same thing, but yes. Yes,
5 sir, I do.

6 Q. And do you also consider the data elements
7 containing the green boxes to be part of this data
8 structure?

9 A. The green boxes, starting from the element
10 info -- it's kind of hard to draw on this thing --
11 starting from the element info and the other green boxes
12 on the diagram, yes, I consider that to be part of this
13 data structure.

14 Q. Okay. I realize it may be somewhat tedious,
15 but for the record, can you identify those data
16 elements, and as you read the letters that identify
17 them, can you tell them -- tell us what those stand for?

18 A. Yes, sir. Starting from the element info
19 box -- I guess I missed it.

20 Starting from the element info box, we see a
21 little magnifying glass that shows us an expanded view
22 of what's actually in that green box. There was not
23 space to include all the information I needed to there.
24 It expands into a structure that has a green box on top
25 and is followed below by an sdtix structure. You'll see

1 below sdtix a file name and line number. That's the
2 citation to the place in the source code where I found
3 the definition for this struct; sdtix stands for
4 structured document tag information extra.

5 This struct provides access to the next
6 struct on my diagram, which, to the right, is simply
7 labeled sdti. That stands for structured document tag
8 information.

9 That, in turn, provides access to the next
10 struct on my diagram, which is the tiq, the T-I-Q, which
11 stands for tag information qualified, T-I-Q.

12 Going further, the document refers, in the
13 lower left, to maybe the longest name. The name is
14 vxsvc.hplxsdr, and that stands for -- the V -- following
15 the V, we have svc -- that means XML schema definition
16 collection -- dot hplxsdr.

17 Within that structure, we see Schema No. 0
18 pointing above it to xsdr; xsdr stands for XML schema
19 definition record.

20 And then the green element in that field is
21 called hsttbElements, and that is the name that I use
22 when I'm describing the final table on the right. It
23 does not have that label down below, but due to the way
24 the expansion happens here, that's the name that I used
25 to refer to it.

1 Q. A couple of those first structures started
2 with STD, and you said that was structured document tag.

3 Do you know why it's called structured
4 document tag?

5 A. Well, I'm not sure why someone shows that
6 name, but it makes a lot of sense to me, because
7 structured document tag describes what happens when you
8 take a word document and you add structure to it by
9 bracketing certain elements -- certain areas of the
10 document with tag names that say what the meaning of
11 this region of the document is.

12 It turns -- takes a document and turns it
13 into a structured document through the use of tags. So
14 that's how I understand it.

15 Q. Dr. Martin, during your education, did you
16 ever take a course on data structures?

17 A. Yes, sir, I did.

18 Q. Did you ever teach any computer science
19 courses related to data structures?

20 A. Yes, I did. I should say, though, that I
21 didn't teach a course that was entitled data structures.
22 At my last university, I taught the third semester
23 programming course. Our data structures course was the
24 second semester programming course. So I'd like to say
25 something about these two courses and how they're

1 related to each other.

2 First, the students had to take the second
3 semester course and pass it in order to get into the
4 third semester course.

5 During the second semester course, they took
6 up the topic of data structures, and I know one example
7 that was used in that course. They investigated a data
8 structure called a polynomial.

9 This was meant to model -- to model a concept
10 from mathematics called a polynomial. You may have
11 heard of this or maybe not. But they wanted to model
12 the polynomial, and they did this without actually
13 programming it.

14 They just described what they wanted this
15 data structure to mean, and they analyzed its
16 performance without even putting it on a computer. This
17 is an abstract data-type phase. So that was the data
18 structure there.

19 And then later in the course, they took this
20 abstract data structure, and they implemented it in one
21 programming language, the C programming language, and
22 that pretty much wrapped up that second semester course.

23 I taught the third semester course, and one
24 of the exercises that I routinely used in this course
25 was to go back to that same data structure introduced a

1 semester earlier and to have my students reconsider this
2 using object-oriented programming techniques.

3 And so the students would take the data
4 structure, and then implement it a different way. So
5 what we had was one data structure that first existed
6 without any program behind it whatsoever, and then it
7 was used once as an implementation in the course and
8 then as a separate implementation; yet it was always one
9 data structure.

10 Q. Were you qualified to teach the second
11 semester data structures course?

12 A. Yes. It was well understood at my university
13 that every faculty member was qualified to teach most of
14 the undergraduate courses, certainly including that one,
15 and may be called upon to teach that course at any time.

16 I simply never was called upon to teach the
17 second semester course. I only taught the third.

18 Q. Let's just very briefly take a look at one
19 piece of the Word 2007 source code. I believe you
20 referenced this already in your discussion of the
21 diagram, but can you tell us what's been highlighted
22 here on this page?

23 A. Yes. We're seeing the beginning of the
24 definition for the sdtix struct.

25 Q. And then later -- later on down is another

1 struct declared within that struct?

2 A. Yes. That's highlighted, I guess, at Line
3 558. What we see here is the -- the first highlighting
4 on the page shows the introduction of the struct, and
5 then as we read down the page, there's more information
6 about what is in the struct, because it's not completed
7 yet.

8 We see on Line 558 that the sdtix struct
9 actually contains another struct. This data structure
10 is made up of -- at least this other data structure --
11 in fact, there's a lot of other stuff that makes up this
12 data structure.

13 Q. Dr. Martin, how does Word first create the
14 STD bookmark table?

15 A. Well, the first thing that Word does, when
16 creating the SDT bookmark table, is to allocate memory
17 for the STD bookmark table --

18 Q. How does Word create the CP stream?

19 A. It -- similarly, it first allocates memory
20 for the PC stream.

21 Q. Okay. So this diagram here that's in front
22 of you, that's the diagram for Word 2007?

23 A. Yes, sir.

24 Q. Okay. And I believe we already mentioned
25 that you have a diagram for Word 2003?

1 A. Yes, I do.

2 MR. CAMPBELL: Your Honor, may I approach
3 the poster board and change it?

4 THE COURT: Yes, you may.

5 Q. (By Mr. Campbell) Dr. Martin, is this your
6 diagram for Word 2003?

7 A. Yes, sir, it is.

8 Q. How is this different from the Word 2007
9 diagram?

10 A. This diagram is different in two small ways.
11 The first I'll mention is that it's a different product,
12 so it has different source code, different blueprints,
13 and so the citations to where in the source code these
14 structures are defined are different.

15 Besides that, the only other difference in
16 this diagram is in the upper left-hand corner. On the
17 previous diagram, we saw a box there labeled BMDS, and
18 that stood for bookmark data structures.

19 On this diagram, it's no longer visible,
20 because in the source code for Word 11, the -- there's
21 no name BMDS used to refer to those three or four pieces
22 of information.

23 Instead, they are present in what remains on
24 the top of my diagram. You can see the yellow, yellow,
25 and green highlighting there. They have simply moved

1 from the BMDS in Word 2007, and they're located
2 elsewhere in Word 2003.

3 Q. Are the elements of the SDT bookmark table in
4 Word 2003 the same as in Word 2007?

5 A. Yes, sir, they are.

6 Q. And are all the other structures you
7 described that make up the STD bookmark table the same
8 in Word 2003 and 2007?

9 A. Not all of the structs are exactly the same
10 between Word 2003 and Word 2007; however, the relevant
11 materials that I've presented on this diagram are the
12 same.

13 Q. You described how certain information was
14 moved into the BMDS for Word 2007. Does it make sense
15 to have those data elements in the BMDS in Word 2007?

16 A. Yes, I think it does. It -- to me, this
17 is -- well, what happened -- what must have happened was
18 a Microsoft engineer of some sort looked at the
19 definition in Word 2003 and decided to draw a box around
20 it. They actually introduced this name BMDS.

21 They decided to call it a struct, and they
22 did that for a reason. And I don't know the actual
23 reason the Microsoft engineer did it; however, it seems
24 to me that it -- it's consistent with my understanding.

25 It -- together those three fields expressed a

1 logical relationship that provide the Custom XML feature
2 in Microsoft Word 2003 and then 2007.

3 Q. Dr. Martin, does Word create the SDT bookmark
4 table when an XML file is open that contains Custom XML?

5 A. Yes, sir, it does.

6 Q. What if someone has Custom XML and an RTF or
7 html file. Will Word create the SDT bookmark table?

8 A. Yes, sir, it will. If the Custom XML is
9 expressed in -- appropriately in those file formats
10 after reading and parsing those input files, we'll end
11 up with a data structure that is very similar -- no --
12 that is exactly the same, in terms of what it contains,
13 as the structure -- as the two diagrams that we have
14 seen.

15 Q. If the user used an RTF or html file, will
16 the SDT bookmark table be constructed in a comparable
17 manner to if the user had an XML file?

18 A. Yes, sir. The approach to creating this data
19 structure by reading in the file is comparable between
20 the file formats.

21 Q. What file type do you expect users of Custom
22 XML would use?

23 A. Well, just like in my project in 2001, our
24 goal was to take data produced by one process and then
25 do something with that. And so we needed to be able to

1 actually get it out of the first step of our project.

2 So I would expect that someone who wanted to
3 use XML would naturally produce a file as output that
4 expressed the data in XML format.

5 MR. CAMPBELL: No further questions, Your
6 Honor.

7 THE COURT: Thank you. Cross-exam.

8 MR. KUDLAC: I have a couple of binders.
9 I don't think I'm going to use very much, but just to
10 facilitate things, if you would give me a moment.

11 Your Honor, again, it's source code.

12 THE WITNESS: Oh, great, more.

13 CROSS-EXAMINATION

14 BY MR. KUDLAC:

15 Q. Good afternoon, Dr. Martin. How are you?

16 A. I'm fine. Thank you.

17 Q. Good to see you again.

18 You were just mentioning the BMDS. That's a
19 data structure that has what are called handles, right,
20 pointers to pointers to other data structures?

21 A. Yes, sir, that's correct. The BMDS does
22 contain handles.

23 Q. Before your work on this case, is it correct
24 that you had not done any Custom XML work in Word 2003?

25 A. That's correct. I had not used that feature

1 in Word 2003.

2 Q. And before your work on this case, you didn't
3 have Word 2007 -- well, you hadn't used Word 2007; is
4 that right?

5 A. That's correct.

6 Q. Now, you were here for Dr. Rhyne's testimony;
7 is that right?

8 A. Yes, sir, I was.

9 Q. And so you've now heard what i4i is alleging
10 to be what is called a metacode map and the mapped
11 content.

12 A. Yes, sir, I have heard that.

13 Q. All of the structures that you've identified
14 on your Figure 12 and Figure 24, those are defined in
15 the Word source code in a bunch of different files or a
16 number of different files as either structs or classes;
17 is that correct?

18 A. They're partially defined that way, as
19 structures or classes. What I've actually illustrated
20 on my diagram is the data structures that together
21 comprise the data structure that provides the Custom XML
22 feature. And sometimes that is via a struct definition.

23 However, in many cases, it was critical to
24 read functions to actually understand what the code does
25 over time in order to understand the meaning of the

1 individual pieces that I've shown on my diagram.

2 Q. Sure. And the data structures that you've
3 shown, the individual boxes, they're either structs or
4 classes in Word, the big boxes.

5 A. Well, let me take a shortcut. Yes.

6 Ultimately, they are all expressed through
7 the use of a struct or class mechanism somehow in the
8 source code, that's correct.

9 Q. Now, you've drawn a dotted line on the
10 right-hand side from the ixedr, that top green box.

11 A. Yes, sir.

12 Q. And that goes down to a box labeled with
13 circles all the way down around the bottom to
14 vxedr.hplxedr; is that right?

15 A. That's correct, sir.

16 Q. I'm glad I got that right.

17 MR. KUDLAC: Could I have S306?

18 Q. (By Mr. Kudlac) And if you'd look -- like to,
19 we'll pull it up on the screen, but in your binder, at
20 PX45-033, which will be your Page 299, if you would go
21 to Line 128.

22 A. Yes, sir.

23 Q. Now, there we have the definition of the
24 struct xedr; is that right?

25 A. Yes, sir.

1 Q. And that's a structure that we don't have up
2 on the Figure 24 or Figure 12.

3 A. That's incorrect, sir.

4 Q. Is that part of what you have as a
5 vxcdc.hplxldr?

6 A. Yes. It is the container for the hplxldr.
7 So not the entire sxdc structure is depicted on my
8 diagram.

9 Q. So there are two parts to that, the vxcdc and
10 the hplxldr?

11 A. That's correct, sir.

12 Q. You mentioned the hsttbElements that are part
13 of the xldr.

14 Do you see that?

15 A. Yes, sir.

16 Q. And that provides a handle again; is that
17 right? Another pointer to a pointer to a structure
18 called an STTB?

19 A. My recollection is that that element is
20 declared as a handle, that's correct.

21 Q. You mentioned on direct testimony inserting a
22 tag into -- a Custom XML tag into a document.

23 Do you recall that?

24 A. Yes, sir, I do.

25 Q. And you were -- you were in the courtroom

1 when Dr. Rhyne testified about the Doctrine of
2 Equivalents and that the result of the separation or the
3 separate storage of what has been called the metacode
4 map and the mapped content allows access to mapped
5 content -- I'm sorry -- you can edit the metacode map
6 without access to the mapped content.

7 Do you recall that?

8 A. Not exactly, no.

9 Q. Okay. Were you here for his testimony about
10 the Doctrine of Equivalents?

11 A. I remember testimony regarding that topic,
12 yes, sir.

13 Q. And concerning the patent, that the
14 separation of the metacode map and the mapped content
15 would allow you to access the metacode map to change the
16 metacode map without having access to the mapped
17 content?

18 A. I remember the concept of what you're asking
19 about. I don't remember his testimony.

20 Q. Fair enough.

21 In Word 2003 and 2007, when you add -- when
22 you testified about adding a Custom XML tag, you can't
23 do that without also having access to the mapped
24 content, what he's calling the mapped content, because
25 you have to put the anchor characters into the mapped

1 content; is that right?

2 A. Yes, that's essentially correct. In order to
3 insert a Custom XML tag, you need to make room in the
4 SDT bookmark table. In addition, you need to add some
5 anchor tags -- some anchor characters, I should say, to
6 the CP stream.

7 Q. Those are those less-than and greater-than
8 signs, right?

9 A. They are, coincidentally, the less-than and
10 greater-than signs that we've been talking about for
11 other purposes throughout the trial. It's very
12 confusing, and I apologize.

13 Q. Not a problem.

14 Similarly, when you delete a Custom XML tag
15 from a Word document using Word 2003 and 2007, you
16 access the -- what you called the SDT bookmark table,
17 the -- those three columns, correct?

18 A. Yes.

19 Q. And you also have to access the -- what has
20 been called the mapped content to take out those anchor
21 characters; is that right?

22 A. That's correct, yes, sir.

23 MR. KUDLAC: That's all the questions I
24 have. Thank you.

25 THE WITNESS: You're welcome.

1 MR. CAMPBELL: No questions, Your Honor.

2 THE COURT: Very well. You may step
3 down.

4 THE WITNESS: Thank you.

5 THE COURT: All right. Who will be your
6 next witness?

7 MR. CAWLEY: Your Honor, i4i will call
8 Mr. Michael Wagner.

9 THE COURT: All right. Mr. Wagner.
10 Mr. Cawley?

11 MR. CAWLEY: Yes, Your Honor.

12 THE COURT: The ELMO goes down, and you
13 push a button rather than pushing on it. Ms. Ferguson's
14 afraid you're going to break it.

15 MR. CAWLEY: That's why I decided to
16 leave it alone.

17 May I proceed, Your Honor?

18 THE COURT: Yes, you may.

19 MR. CAWLEY: May I approach the
20 witness?

21 THE COURT: Yes, you may.

22 MR. CAWLEY: And the bench?

23 MICHAEL WAGNER, PLAINTIFFS' WITNESS, SWORN

24 DIRECT EXAMINATION

25 BY MR. CAWLEY:

1 Q. Can you state your name, please.

2 A. Michael Joseph Wagner.

3 Q. Why are you here today, Mr. Wagner.

4 A. I have been asked to calculate the damages
5 for i4i, assuming that the '449 patent is valid and that
6 you find that Microsoft infringes that patent.

7 Q. And what makes you qualified to do that job?

8 A. My education and experience.

9 Q. Well, tell us about your education, first of
10 all.

11 A. I have a Bachelor of Science degree in
12 engineering from the University of Santa Clara, which I
13 received in 1969. I have a Master's in Business
14 Administration, which I received from UCLA in 1971. And
15 I have a juris doctorate degree from Loyola University
16 School of Law, which I received in 1975.

17 Q. Do you have any professional licenses?

18 A. I do.

19 Q. Tell us what those are.

20 A. Currently, the active license I have, I am a
21 Certified Public Accountant in the state of California.

22 I'm also a licensed attorney in the state of
23 California.

24 Q. Tell us now about your professional
25 experience. How have you spent your career?

1 A. Well, for the last 32 years, I have been the
2 type of work I'm doing for you in this case, and that is
3 calculating commercial damages. And I've really done
4 that for four different firms during that period of
5 time.

6 The longest time I was with PriceWaterhouse,
7 which is one of the Big 8 accounting firms. And I was a
8 partner in that firm.

9 And I was with two very large management
10 consulting firms that were publicly traded. The last
11 was called CRA International, and, actually, that firm
12 supported me in this work.

13 And, currently, I'm with a small firm in the
14 Silicon Valley, California called LitiNomics.

15 Q. Are you a member of any organizations that
16 deal with valuation issues?

17 A. I am.

18 Q. What are they?

19 A. The American Institute of Certified Public
20 Accountants and also The California Society of CPAs.

21 Q. And have you written anything about doing
22 this kind of work?

23 A. I have.

24 Q. How many papers or other publications?

25 A. I have 25 professional publications.

1 Q. All right. Are there any that are
2 particularly cited or consulted in this field?

3 A. Yeah, I think one of them is. I am the
4 founding co-editor of a book called The Litigation
5 Services Handbook. It's now in its fourth edition,
6 published by John Wiley.

7 And it is cited in the treatise of scientific
8 evidence that is published by the Federal Judicial
9 Center to give federal judges guidance on economic
10 damages. And my book is only one of five sources
11 referenced in that work.

12 Q. Wait a minute. I think that I may have a
13 copy of it here.

14 Is this the book that you're referring to?

15 A. It is.

16 Q. Okay. Have you provided expert opinions
17 before to help juries understand the amount of a
18 reasonable royalty when a patent has been infringed?

19 A. I have.

20 Q. What kind of information did you consult or
21 study doing your work on this case?

22 A. Well, the entire record produced by both
23 parties was made available to me and my staff, but the
24 types of things that I looked at would inform of the
25 value of the patent.

1 And those are things like the license
2 agreements that these two parties have entered into in
3 the real world; all the financial information from
4 Microsoft as to the amount of sales and the types of
5 profits they earned when they sell their products; and
6 then a lot of internal information, usually e-mails or
7 internal presentations or external presentations that
8 talk about the technology that's at issue in this case.

9 I also collected public information about XML
10 and this industry. I looked at depositions that were
11 relevant to the work that I'm doing in the case. I
12 reviewed a number of the expert reports in this case,
13 both the technical and damage experts on both sides of
14 the case.

15 And I had conversations with a number of the
16 executives at i4i to understand their business, and that
17 was principally Michel Vulpe and Loudon Owen. Then my
18 staff talked with Dr. Martin to understand the
19 technology at issue.

20 Q. And have you also attended the trial thus
21 far?

22 A. I've been here painfully since it started.

23 Q. Why do you do that?

24 A. I do so I can understand the record, because
25 I'm really trying to address what's happening here in

1 the courtroom, not what's done before.

2 Q. All right. If the jury in this case decides
3 that Microsoft infringes i4i's patent and finds that the
4 patent is valid, how do you go about figuring out the
5 amount of i4i's damages?

6 A. Well, in this case, I've calculated a measure
7 called a reasonable royalty amount of damages.

8 Q. Okay. And just so we're all clear, I know
9 we're in East Texas here, so this is probably mother's
10 milk to many people here, but what is a royalty?

11 A. Well, a royalty is simply a payment for use
12 of someone else's property. And a very common form of
13 royalty here in Texas is, if you're lucky enough to own
14 land that has oil or gas underneath it and the oil and
15 gas company wants to extract that material, they may pay
16 you a royalty check every month, if they're trying to
17 get that oil out of your property.

18 Q. Okay. Well, since we're not talking about
19 mineral rights, instead we're talking about patent
20 rights, tell us how someone like you goes about
21 determining the amount of a reasonable royalty for using
22 someone's patent.

23 A. Well, the term we all use is called a
24 Georgia-Pacific analysis.

25 Q. And what does Georgia-Pacific mean?

1 A. Well, it's actually a case and it was a case
2 that a federal judge in 1970, which is a long time ago,
3 actually wrote out 15 different factors that someone
4 like me, a damage expert, should consider in arriving at
5 a conclusion as to what a reasonable royalty rate should
6 be.

7 And he laid out 15 different factors, the
8 last which was called a hypothetical negotiation.

9 Q. Okay. Let's -- let's understand that a
10 little bit better.

11 What is a hypothetical negotiation?

12 A. Well, it's, by definition, a negotiation that
13 didn't occur. There was no actual negotiation between
14 these parties for these patents. If there was, we
15 wouldn't be here.

16 So we go back in time to the date right
17 before the first infringement and assume the parties
18 would get together and try to figure out what the patent
19 was worth, and they would use all the information that
20 was known both then and subsequent to inform each other
21 as to what the patent was worth.

22 Q. How do you go about, then, calculating the
23 amount of a reasonable royalty?

24 A. Well, first off, I'm going to have to start
25 with some type of baseline or starting point to what I

1 think the parties would begin their negotiation with.

2 Q. Okay. And is there a formula that you use
3 once you get that baseline?

4 A. Yes, there is, and it's a pretty simple
5 formula.

6 Q. Are we on the -- there we go.

7 A. And it's a very simple equation. I first
8 have to determine a reasonable royalty rate, and that is
9 the amount that Microsoft would pay for each accused
10 product that is infringing the patent.

11 And I have to apply that to something, which
12 is called a royalty base. It could either be the
13 revenues from the products sold or the actual units of
14 products sold.

15 And once I have the reasonable royalty rate
16 and the base, I multiply the two together and that would
17 give me the reasonable royalty.

18 Q. All right. And let's start with your
19 formula. You said that the first thing that you have to
20 decide is a reasonable royalty rate?

21 A. That is correct.

22 Q. Okay. So I want to -- I want to talk some
23 more about how you did that, but let's go ahead and jump
24 to your conclusion.

25 What did you conclude was a reasonable

1 royalty rate in this case?

2 A. \$98 per infringing unit actually used in an
3 infringing manner.

4 Q. Okay. Let's make sure we understand that.
5 Are you saying that you believe that i4i is entitled to
6 \$98 for every copy Word 2003 or 7 that is sold?

7 A. No.

8 Q. Why not?

9 A. Because your client is only -- they should
10 only receive a payment for products that were actually
11 used in an infringing manner. Most of the products that
12 are capable of infringing were not used in an infringing
13 manner.

14 Q. Is that for anybody who used it in an
15 infringing manner?

16 A. Well, no. The only people that I've
17 calculated a royalty for are business users of these
18 products.

19 Q. All right. Well, I can't help but remember
20 that it was only two days ago now that Microsoft's
21 lawyers stood here and held up in front of the jury a
22 yellow box, and he said that that was a copy of
23 Microsoft Word 2007 that he bought on Amazon, and he
24 told this jury that you were going to say that i4i
25 should get a hundred dollars for that.

1 Is that true?

2 A. Well, first off, it should have been \$98.

3 But, no, for that particular product, it would have been
4 zero.

5 Q. Why is that?

6 A. It's because I'm only calculating damages for
7 business users. I'm not calculating damages for
8 individuals, either students or home users who brought
9 products, even if they did use it in an infringing
10 manner.

11 So Mr. Powers is safe to use that for the
12 rest of his life, and he's not going to pay any
13 royalties to i4i.

14 Q. All right. And you're not suggesting that
15 any businesses out there pay i4i royalties, other than
16 Microsoft, are you?

17 A. That's correct.

18 Q. Now, we also heard that Mr. Powers paid,
19 what? I think he said \$97, something in that vicinity.

20 Are you aware of whether or not businesses
21 out there get that price for Microsoft Word?

22 A. No. That is not a price that businesses pay.
23 That's the cheapest version of the product. And the
24 versions of the products that you incorporate these
25 features and are used allegedly in an infringing manner

1 are significantly more than that amount of money.

2 Q. Okay. Let's get on now then. I told you I
3 wanted to come back to this. I want to understand how
4 you reached your conclusion that \$98 per copy for a
5 business that actually uses it to infringe, how you
6 reached that conclusion.

7 What did you do?

8 A. Well, I did the Georgia-Pacific analysis as
9 I've explained.

10 Q. Okay.

11 A. But before I did that, I had to come up with
12 a starting point, and that's what I call a baseline
13 rate.

14 Q. All right. And how did you determine the
15 baseline rate?

16 A. Well, I started the record for what this type
17 of technology is worth at or around the time of the
18 hypothetical negotiation, which is in around October of
19 2003.

20 And I looked at documents that, according to
21 Microsoft, as to what the competitive offerings were at
22 that time.

23 Q. Okay. And is there a certain rule of thumb
24 that you're gathering that information for?

25 A. Yes. Now once I find a yardstick, I'm going

1 to have to determine what it's worth, and I used what is
2 called the 25-percent rule.

3 Q. What's that?

4 A. The 25-percent rule is a rule of thumb in
5 licensing that everything else being equal, that when an
6 inventor allows someone else to use their invention,
7 they'll keep 25 percent of the profits from the sale of
8 that infringing product. And that will leave 75 percent
9 to the person who uses it, here Microsoft.

10 Q. Is this an approach that's well-recognized in
11 your field?

12 A. Yes. Many people use this approach. Some
13 people don't like it, but it's widely used.

14 Q. And how did you estimate the profits that
15 Microsoft made due to infringement?

16 A. Well, first, I had to come up with what is a
17 product that would have these types of features worth in
18 the marketplace. And so I determined the revenues first
19 before I determined the profits.

20 Q. Okay. Tell us how you went about identifying
21 something to use as a benchmark to apply this 25-percent
22 rule to.

23 A. Well, I looked at internal information of
24 Microsoft as to who they thought had competitive
25 products to offer XML to their customers instead of

1 getting it from Microsoft themselves.

2 Q. Okay. And what did you find?

3 A. Well, I found that at or around or before the
4 time of the hypothetical negotiation, they looked at
5 three principal products as being their most significant
6 competitor, the first one being a product called
7 FrameMaker 7.0, and the retail price for that, if
8 someone wanted to use that with Word, they would have to
9 pay \$799.

10 And also there was a product called Arbortext
11 Epic Editor 4.2, and that also offered XML editor
12 capability, and that sold for \$695.

13 Then there was a third product called
14 XMetaL for Authors, which was selling for \$499 a unit.

15 Q. And you've got Plaintiffs' Exhibit 51 here,
16 and I don't want to have to take the time to go look at
17 that, but is it fair to say that it's in that exhibit
18 that Microsoft itself identified these three products as
19 competitors?

20 A. Yes, these and others. But these are listed
21 as the primary competitors at that point in time.

22 Q. Okay. Did you consider anything else?

23 A. Yes. I considered two other possible
24 baseline rates, and that, in the middle here, I have
25 what's listed as Microsoft SGML author.

1 And that is a -- not an XML editor, because
2 it was back in 1995, but is another type of editor for
3 this type of markup language. And Microsoft thought
4 that their customers who had Word who wanted this type
5 of functionality would buy, as an add-on to Word, this
6 product, and they would charge \$595 for this capability.

7 And then the bottom one is what was i4i
8 selling its product for that had this functionality, and
9 that was the S4/Text product, and they sold it for \$275.
10 But I have a plus sign after that, because they also,
11 besides selling the product, were going to do consulting
12 services with their clients and would earn more money
13 than that from their customers.

14 Q. Okay. Now, just so we can make sure that we
15 understand why we're even looking at these products and
16 the prices for them, are all of these things that people
17 might buy if they were in the market for something that
18 helped them do XML?

19 A. Yes.

20 Q. Okay. So which one of these products that
21 allow people to do XML did you choose as your benchmark?

22 A. I chose XML for Author at \$499.

23 Q. And why?

24 A. Well, one thing, this is the product that
25 Microsoft had bought and was using internally before

1 they put this functionality in their own product. And
2 it's cheaper than all the other alternatives, except for
3 S4/Text, which may be even more expensive than that when
4 you consider all the consulting services as well.

5 So I thought it was a reasonable and most
6 conservative starting point for what this type of
7 functionality is worth at the hypothetical negotiation.

8 Q. All right. Having picked this benchmark of
9 the value in the marketplace of a product that helped
10 people who wanted to do XML do XML, what's the next
11 step?

12 A. Well, the next step is to determine what is
13 the profits that Microsoft earns when they sell their
14 products.

15 Q. Okay. Well, they didn't sell XMetaL for
16 Author, right?

17 A. They did not.

18 Q. So what's their profit got to do with
19 anything?

20 A. Well, it's because you have to figure out a
21 profit split between the licensee and the licensor for
22 the use of the invention.

23 Q. Okay. So are you saying that the \$499
24 represents some value you believe Microsoft could have
25 gotten in the marketplace from customers who

1 specifically wanted XML?

2 A. Right. For the small percentage of the
3 customers who really needed that functionality in Word
4 and if it was not in Word, this is what they would have
5 done. They would have had to buy one of these types of
6 products.

7 Q. And you assumed that if Microsoft had chosen
8 to do that, it could have achieved the same profit
9 margin selling this product as it does in selling other
10 products?

11 A. That is correct.

12 Q. What is Microsoft's profit margin?

13 A. I have calculated their profit margin during
14 the entire period that I've calculated damages to be
15 approximately 76.6 percent, which means for every dollar
16 of revenue Microsoft earns, they have profits of 76.6
17 cents.

18 Q. What's the source of that calculation?

19 A. That's the internal financial statements for
20 the operating business unit that Microsoft sells the
21 infringing or allegedly infringing products.

22 Q. And have you shown us that calculation here?

23 A. Well, just that I've got a chart that shows
24 the \$499 starting price or benchmark. The 76.6-percent
25 profit margin would leave Microsoft with profit margins

1 of \$382 dollars per unit.

2 Q. Okay. And then what do you do about the
3 25-percent rule?

4 A. Well, then I apply the 25-percent rule to
5 that and say the starting point of this hypothetical
6 negotiation would be \$96 a unit is what the parties
7 would start then negotiating about.

8 Q. Okay. Now, just so there's not any
9 confusion, has Microsoft actually sold Word for \$499?

10 A. Well, they sold products that incorporated
11 the infringed unit for that and more, and they've also
12 sold it for less.

13 Q. Has Microsoft actually made \$96 in profits
14 selling Word?

15 A. Again, on some products they have, and others
16 they have not.

17 Q. Then why -- why are you using this \$96 as a
18 starting point?

19 A. Well, I have a problem, and it's no one's
20 fault, but Microsoft has a business strategy, when they
21 put a new feature in their products, they do not raise
22 their price for that feature. That's just not their
23 business strategy.

24 Their business strategy is to make sales, and
25 you have to understand who Microsoft's biggest

1 competitor is, and that is itself. Microsoft has the
2 largest install base of any company in the world.

3 And they have to try to induce their
4 customers, who have perfectly good Microsoft Word
5 product, to upgrade or buy a new copy of that software.

6 So that Microsoft Word product, in this
7 example here, would be -- would be Word XP, which is the
8 version -- the successor version before Word 2003, that
9 someone doesn't need that product anymore but has to
10 upgrade to the next edition.

11 That old edition has the thousands of
12 features that Microsoft has put in its product already.
13 You don't need to pay for that again. The reason why
14 you upgrade is you get something new, and that's what
15 I'm -- I have to try to value, when they don't put an
16 additional price on that.

17 Q. Let me make sure that I understand what you
18 just said.

19 If there's a business and it uses Microsoft
20 Word, and let's assume that since it uses -- has a lot
21 of computers with Microsoft Word. It's paid \$50,000 to
22 Microsoft to be able to use Microsoft Word, and it had
23 the XP version that, as I recall, came out around 2000.
24 Then Microsoft decides to come out with a new -- with a
25 version of Word, Microsoft 2003, but it says to this

1 business, you know, there's really nothing new in 2003.

2 Then what do you think the business is going to do?

3 A. I don't think they would buy 2003. I still
4 use Word XP on my business computer. I have three
5 personal computers at home. They are all Vista, but
6 never upgraded XP, because I don't need to.

7 Q. Okay. But now let's say on the other hand,
8 instead of saying to the world, well, here's a new
9 version, but there's nothing new, let's suppose
10 Microsoft says Word 2003 supports XML and you need it.
11 Then what do you think might happen?

12 A. Well, if you believed that you may need it
13 and you understand what Microsoft is trying to sell you,
14 you may upgrade or buy a new version.

15 Q. And if you do that, would you expect that
16 that business might well pay Microsoft another \$50,000
17 for the new version?

18 A. That's very possible.

19 Q. So has Microsoft made money without having to
20 raise its price for the new feature?

21 A. They have, in my opinion.

22 Q. So based on your calculations, what
23 percentage of Microsoft customers who purchased a
24 version of Word that was capable of infringing the
25 patent in the United States would Microsoft have to pay

1 a royalty on?

2 A. Approximately 2 percent.

3 I have calculated during the damage period
4 approximately 2.1 million users have used Word in an
5 infringing manner. And the source for my work or the
6 evidence of that is in Plaintiffs' Exhibit 631, which is
7 Schedule 1 to my damage model.

8 Then I've estimated the total amount of Word
9 products that are capable of infringing the patent sold
10 during the same time period in the United States. And
11 that's 108,900,000 copies. And the work I did to
12 support that calculation is Plaintiffs' Exhibit 635,
13 which is Schedule 5 to my damage model, which relies
14 upon Plaintiffs' Exhibit 636, which is Schedule 6,
15 Plaintiffs' Exhibit 484, which is Schedule 7, and
16 Plaintiffs' Exhibit 485, which is Schedule 8.

17 Q. Okay. So I want to make sure we understand
18 this pie.

19 Are you saying that the whole pie is all the
20 copies of Word that could be used to infringe this
21 patent that have been sold by Microsoft?

22 A. If they used the method that your client is
23 accusing of practicing their invention, yes.

24 Q. And that's in the United States?

25 A. This is only in the United States.

1 Q. Okay. But the red little slice out of the
2 pie at the top, that represents only the customers who
3 bought it and actually used it to infringe the patent?

4 A. Based on my estimates, yes.

5 Q. And your reasonable royalty, is that going to
6 apply to the whole pie?

7 A. No. It's only to that little red sliver of
8 people who actually used the invention.

9 Q. And, again, you're not talking about
10 expecting those customers of Microsoft to pay anything,
11 are you?

12 A. No.

13 Q. You're expecting Microsoft to pay fair value
14 for the use of the patent, if their customers have
15 chosen to use Microsoft's product to infringe; is that
16 right?

17 A. That is correct.

18 Q. Okay. So based on your calculations, what
19 percentage -- what percentage would this be? Two
20 percent you said?

21 A. Yes. Approximately two percent of
22 Microsoft's customers in the United States actually used
23 the product in an allegedly infringing manner.

24 Q. All right. So if instead of just asking a
25 royalty from Microsoft for the customers who actually

1 use it to infringe, if you just spread it across all the
2 copies of Word capable of infringing that could be used
3 to infringe, about how much are you talking about per
4 copy?

5 A. A little bit less than \$2 per copy. So as an
6 example of Mr. Powers' 98-dollar version, it would be \$2
7 from that. It would be \$2 on a 500-dollar product or a
8 700-dollar product.

9 Q. Okay. All right. After you determined the
10 baseline royalty rate, what did you do then?

11 A. I then did the Georgia-Pacific analysis,
12 analyzing the 14 factors that lead up to the
13 hypothetical negotiation.

14 Q. Okay. So you took those 14 things that the
15 judge wrote about in 1970 and considered all those
16 factors?

17 A. I did.

18 Q. Do we have to talk about them all?

19 A. Well, only five of them, based on my
20 analysis, would cause me to change my starting point
21 position.

22 Q. Okay.

23 A. And that's G-P Factors No. 3, 5, 6, 9, and
24 11.

25 Q. Well, let's just talk about those.

1 Tell us about Factor 3.

2 A. Well, G-P Factor No. 3 up at the top is
3 called the nature and scope of the license as exclusive
4 or nonexclusive, or as restricted or nonrestricted.

5 Q. Okay. And -- and what does that mean?

6 A. Well, what that means is you have to look at
7 the license that we're talking about. At the
8 hypothetical negotiation -- the hypothetical license
9 we're talking about here, it's a non-exclusive license.
10 That's all Microsoft gets.

11 It's also restricted to the United States;
12 it's not worldwide. And there's no cooperation or
13 know-how or special treatment they get from the inventor
14 i4i.

15 They have to figure out how to use it
16 themselves. So that's the nature of this hypothetical
17 license that is being granted here, assuming my client
18 prevails.

19 Q. All right. So what effect do you think that
20 this Factor No. 3 would have on what the parties would
21 have negotiated as a fair rate?

22 A. Well, I have to compare that to my starting
23 point. The basis for the 25-percent rule are licenses
24 in the real world where people got more than just this
25 non-exclusive restriction to the United States with no

1 other cooperation.

2 In those licenses that form the basis of the
3 25-percent rule, the licensee or the user got more than
4 that. They got things like know-how, cooperation, maybe
5 some trade secrets. And often they were worldwide.
6 So those are a more powerful arsenal of assets that the
7 licensee got. So, therefore, because there's less being
8 given here, this would lower my royalty rate for my
9 starting point.

10 Q. Okay. What's the next factor you considered?

11 A. The next factor is Georgia-Pacific No. 5, and
12 that's the commercial relationship between i4i and
13 Microsoft.

14 Q. Okay. Tell us what your analysis is of that
15 factor.

16 A. Well, I want to try to understand. Is i4i
17 going to lose sales of their product, if they license
18 Microsoft?

19 And I talked, again, to the executives at i4i
20 as to what they viewed happened to them after Microsoft
21 incorporated XML -- custom XML capability in their
22 product. And I also looked at public information and
23 then internal statements within Microsoft as to whether
24 they thought their putting this functionality in the
25 product would take business away from i4i.

1 Q. What did you conclude?

2 A. That these parties are clear competitors.

3 Now, Microsoft would not consider i4i a
4 competitor; they're not. But Microsoft is a competitor
5 to i4i. If they do what they did here, it destroys a
6 very large segment of the market that i4i could possibly
7 address.

8 Q. Can you give us some examples of documents
9 which you considered to arrive at this conclusion?

10 A. Yes. Here are two statements.

11 The first one, which is Plaintiffs'
12 Exhibit 49, a statement by Martin Sawicki, where he said
13 Word 11, which is Word 2003, will make i4i's product
14 obsolete.

15 And then Andy Zukerberg, in Plaintiffs'
16 Exhibit 100, said: My main concern with i4i is that if
17 we do the work properly, there won't be a need for their
18 product.

19 So those statements tell me even Microsoft
20 recognized that i4i was going to lose market opportunity
21 if they used this technology.

22 Q. And did you consider other documents in the
23 case that confirmed your conclusion that Microsoft was a
24 competitor of i4i?

25 A. Yes. In my report, I listed a number of

1 other documents that also support my conclusion that
2 these companies were competitors.

3 Q. All right. In the interest of time, we don't
4 need to read those, but let's just go on.

5 And let me ask you, what did you conclude
6 about this factor?

7 A. This factor would increase the reasonable
8 royalty from my starting point.

9 Q. Okay. What's the next factor you considered?

10 A. Factor No. 6, and that is the effect of sales
11 of the accused features on sales of other products,
12 which are often called convoyed sales, or sales that go
13 along with the accused product.

14 Q. And what -- what information did you consider
15 in evaluating this factor?

16 A. Well, again, I looked at internal statements
17 of Microsoft, deposition testimony of Microsoft's
18 witnesses as to the effect of promoting the
19 functionality here on sales of other products,
20 principally Microsoft Office.

21 Q. Okay. And can you tell us what some of those
22 documents said that you considered?

23 A. Yes. The first one is a quote from Guy
24 Gilbert in Plaintiffs' Exhibit 180 where he said: To
25 encourage more people who need XML to buy Pro.

1 Now, Pro is short for Professional Edition of
2 Office. So that's the most important product that
3 Microsoft sells to its business customers.

4 And he goes on in the same document in the
5 middle quote where he said: Pro is at risk of losing
6 its market share to Standard.

7 Standard is another edition of Microsoft
8 Office but has less functionality and sells for a
9 cheaper price.

10 Since Access no longer provides sufficient
11 justification for people to spend the extra money on
12 Pro.

13 Access is a data management program within
14 Office, which a lot of businesses use in their practice.
15 But it was not generating the value that Microsoft
16 needed to induce their customers to buy this more
17 expensive product.

18 He then goes on to say that arbitrary XML,
19 which is the use of customer-defined schema, is one of
20 the most important ways we're trying to stop that trend.

21 And then the last statement I have is
22 Plaintiffs' Exhibit 73. It's a statement by Microsoft,
23 and they said: Foremost, among the improvements in Word
24 2003, is the deep support for customer-defined XML
25 available in the Professional Edition.

1 Q. Okay. And did you rely on other documents
2 that you haven't given us excerpts from here in reaching
3 your conclusion here about this factor?

4 A. Yes. This other document for this next slide
5 shows other documents that I used to support my
6 conclusions here that are in my report.

7 Q. Okay. And then what is your conclusion about
8 this factor?

9 A. That, again, this would increase the
10 reasonable royalty, because Microsoft is selling very
11 expensive Office products by trying to encourage their
12 customers to upgrade those products using custom XML
13 functionality.

14 Q. All right. What's the next factor you
15 considered, Mr. Wagner?

16 A. Factor No. 9, which is the utility and
17 advantages of the patented technology over the previous
18 technology.

19 Q. All right. Tell us about that.

20 A. Well, here you're trying to see is this
21 really a major advance over the prior art or is it just
22 a small, trivial advance?

23 And also, can Microsoft do this another way?
24 Do they need to enter this license, or is this really
25 their only choice?

1 Q. All right. How did you conclude -- or what
2 conclusion did you reach about whether there were any
3 commercially acceptable non-infringing alternatives
4 available to Microsoft?

5 A. Well, based on the record that I have seen
6 both at the time of my report where I reached this
7 conclusion, and also since then with subsequent
8 production of information that there are no commercially
9 acceptable non-infringing alternatives to using i4i's
10 patent, if Microsoft wants to offer custom XML.

11 Q. Do you have slides that show us some examples
12 of Microsoft's statements about its inability to offer
13 custom XML in any way, besides the one they actually
14 used?

15 A. Yes. There was a Microsoft white paper,
16 which is Plaintiffs' Exhibit 205, which said: Although
17 some capabilities enabled by custom XML's schemas could
18 have been implemented previously with clever and
19 extensive coding, these solutions were fragile and
20 difficult to create, which shows it's going to be very
21 difficult.

22 Even with all the really terrific software
23 designers at Microsoft, they didn't know a way to do it.

24 Then there was a Microsoft brochure that
25 said: While many companies and industries have seen

1 great benefit from the use of XML, the introduction of
2 XML-enabled desktop applications with support for
3 customer-defined schemas carries the potential for even
4 greater benefit.

5 This shows how important custom XML, not just
6 plain vanilla XML, was to Microsoft's customers.

7 Q. What did you conclude about this factor and
8 its effect on the hypothetical negotiation?

9 A. That, again, since Microsoft had no other
10 alternative, this would raise the rate.

11 Q. What's the next of these Georgia-Pacific
12 factors that you considered?

13 A. Well, the last one that I considered that had
14 an effect on the rate was the extent to which Microsoft
15 has made use of the technology and the value of that
16 use.

17 Q. Can you give us a brief summary of what you
18 found in your review of the evidence on that issue?

19 A. Yes. Again, I have some quotes from internal
20 Microsoft documents, the first from Jean Paoli, which is
21 Plaintiffs' Exhibit 211, where he said:

22 Customer-defined schemas are the most
23 important effort we did on XML in Office since ever.

24 And then Chris Pratley in Plaintiff's Exhibit
25 212 said: We love XML, especially arbitrary or

1 customer-defined XML. We emphasize customer-defined
2 schema because we truly believe with all of our hearts
3 that that is where the future is, seriously.

4 And Chris Pratley also said in Plaintiffs'
5 Exhibit 183: I don't want it to seem that the
6 customer-defined schemas thing is a slight addition.
7 It's more like 90 percent of the value.

8 And then finally, a Microsoft presentation
9 where they said: In many ways, XML support in the
10 Office system is the glue that holds the Office
11 ecosystem together.

12 Q. And were there other documents that you saw
13 that confirmed your conclusion about this factor?

14 A. Yes. There are a number of other documents I
15 cite in my report that has the same type of information.

16 Q. What did you conclude about the effect that
17 Factor 11 would have had on the negotiation?

18 A. It increases the rate from my baseline rate.

19 Q. Okay. Now that you've described all of the
20 five factors you wanted to discuss, give us a summary.

21 In other words, how do they all come out in
22 the end?

23 A. Well, they're not all weighted equally, but
24 four factors went up; one went down; and the rest were
25 neutral in my determination.

1 Q. Okay. And you told us that the 15th factor
2 was the hypothetical negotiation.

3 So how do you use that factor in this
4 hypothetical or pretend negotiation that would have
5 happened between Microsoft and i4i?

6 If they had a negotiation, how do you fit
7 these factors into that?

8 A. Well, it's based on my professional judgment,
9 but it's using the information I gathered in these other
10 14 factors and synthesizing all of that together to
11 reach a final conclusion.

12 Q. Okay. So you've gone out and found a product
13 that you think is a fair representative of the value in
14 the marketplace of XML, right?

15 A. At the time.

16 Q. And then you've applied the 25-percent rule,
17 so that -- that you think that it's fair that the patent
18 owner get not 25 percent of the price but 25 percent of
19 the profit that someone makes from using the invention;
20 is that right?

21 A. That is correct.

22 Q. And then you calculated that that was -- what
23 did you say, \$98?

24 A. No, that was \$96.

25 Q. \$96. Okay.

1 And now you've applied the Georgia-Pacific
2 factors to see if you think that the four factors going
3 up and the one going down should change that \$96?

4 A. That's right.

5 Q. And how much did you decide it should change
6 it?

7 A. I increased it by \$2 to \$98.

8 Q. Okay. So you think that those four factors
9 all pointing up that we just discussed would really only
10 make a 2-dollar difference in the royalty?

11 A. Based on my judgment and considering the
12 entirety of my analysis.

13 Q. All right. Now that we've determined what
14 you believe, in your opinion, is the reasonable royalty
15 rate, what's the next thing we need to talk about?

16 A. Well, now we have to get the base. What are
17 we going to apply that royalty rate --

18 Q. What does base mean?

19 THE COURT: Mr. Cawley, I think we'll
20 take our afternoon break, if this is a good time.

21 MR. CAWLEY: Absolutely.

22 THE COURT: We will take our break, and
23 we will be in recess until 3:10.

24 (Jury out.)

25 (Recess.)

1 COURT SECURITY OFFICER: All rise.

2 (Jury in.)

3 THE COURT: Please be seated.

4 All right, Mr. Cawley. You may continue.

5 MR. CAWLEY: Thank you, Your Honor.

6 Q. (By Mr. Cawley) Mr. Wagner, we've made some
7 good progress. I think we've got about 15 minutes to
8 go, but remind us now, what was the formula that we're
9 trying to fill in that you told us about near the
10 beginning of your testimony?

11 A. It would be the royalty rate times a royalty
12 base equals the reasonable royalty.

13 Q. Okay. And the royalty rate, that's the
14 analysis you went through and told us how you arrived at
15 your conclusion that that would be \$98 for every
16 business that uses it to infringe, correct?

17 A. That's correct.

18 Q. Okay. Now let's talk about the next piece of
19 the formula you need to know.

20 The royalty base, what is that?

21 A. Well, since my royalty rate is a dollar per
22 unit, I determined the number of units of products that
23 Microsoft sells that has an allegedly infringing product
24 that would practice the invention.

25 Q. The number of units?

1 A. Units.

2 Q. Okay. And units that are used in what way?

3 A. That use the methods taught in the patent and
4 the claims that are being asserted in this case.

5 Q. Once again, we're not talking about all the
6 units they sold, correct?

7 A. That is correct.

8 Q. We're not talking about the units they sold
9 to individual people, correct?

10 A. That is correct.

11 Q. We're talking about the units -- are you even
12 talking about all the units they sold to businesses?

13 A. No.

14 Q. What are you talking about?

15 A. Well, I'm talking about the businesses that
16 have actually used it in an allegedly infringing manner.

17 Q. Okay. How did you estimate the number of
18 businesses that have used Microsoft's product to
19 infringe?

20 A. I relied upon another expert who you
21 retained, Dr. Wecker, who is an applied mathematician,
22 who did a survey to determine that amount.

23 Q. All right. And we'll hear from Dr. Wecker
24 right after you; is that right?

25 A. I believe that's correct.

1 Q. Okay. And now, is this survey that
2 Dr. Wecker was asked to do the kind of data that experts
3 in your field typically rely on when they need to know
4 something like how many businesses might use a product
5 in a certain way?

6 A. It is.

7 Q. How did you -- how did you come up with
8 Dr. Wecker as someone to use to do this survey?

9 A. Well, I recommended him to you, because I
10 have worked with him a number of times over the last 30
11 years.

12 Q. And are there also other experts in this case
13 that you have also relied on?

14 A. Yes.

15 Q. And who were they?

16 A. Dr. Rhyne and Mr. Gilbane, who are technical
17 experts, who also helped in forming my opinion.

18 Q. Okay. And what are the specific results of
19 the survey that you arrived at in estimating the number
20 of Microsoft's customers who have infringed?

21 A. Well, you may have said my survey. It's not
22 my survey.

23 Q. You're right. I'm sorry. The survey.

24 A. The survey that Dr. Wecker performed, I
25 looked at the Exhibit D to his report, which I have just

1 put up on the screen, which is the conclusions he
2 reached based on his survey.

3 Q. Okay. Can you tell us what the conclusions
4 are.

5 A. Well, the conclusions that I used are the
6 ones that are in yellow. It's probably still not
7 readable.

8 But this is what he has estimated between
9 October of 2003 and November of 2008 when he completed
10 his survey as the number of customers who used Word in
11 an allegedly infringing manner.

12 Q. Well, what's the total result of the survey?

13 A. The total is about 1.8 million users, and
14 that's the two numbers -- the sum of the two numbers
15 over in the far right-hand column, for Word 2007, I'm
16 going to round this around 300,000 units, and for Word
17 2003, it's about 1.6 million.

18 Q. Okay. So is that figure of about 1.8 million
19 the figure that you plugged into the second step of the
20 formula?

21 A. No.

22 Q. Okay. Why not?

23 A. Because he only calculated units through
24 November of 2008. I had to estimate units up until the
25 date of trial.

1 Q. Okay.

2 A. So I did that, and then that's the number
3 that I plugged in.

4 Q. Okay. Great.

5 Before we do the arithmetic in the formula,
6 though, I want to ask you a little bit more about the
7 survey, even though we're going to hear a lot more about
8 it from Dr. Wecker in a minute.

9 Why were the opinions of Mr. Gilbane and
10 Dr. Rhyne important in connection with the survey?

11 A. Well, after Dr. Wecker performed his survey
12 and Microsoft received a copy, they complained -- or
13 they believe that there are certain problems with the
14 survey and that some of these users may not be using
15 Microsoft Word in an allegedly infringing manner.

16 Q. And so what did you learn from Dr. Rhyne and
17 Mr. Gilbane about that?

18 A. That if these occurrences occurred at all,
19 it's rare, and it's also, in their professional
20 opinions, that these same people would also use the
21 product in an allegedly infringing fashion.

22 Q. All right. So based on your conversations
23 with those two gentlemen, did you assume that in the
24 least, opening an XML dot docx or dot dotm document and
25 then saving it as a dot XML doc -- dot docx or dot dotm

1 document infringed the patent?

2 A. Yes. But I can't quite answer your question.
3 I didn't talk about that. I reviewed their reports that
4 addressed these issues.

5 Q. Okay. And you've heard, at least,
6 Dr. Rhyne's testimony about that, too, haven't you?

7 A. I was here today.

8 Q. Okay. There's also something -- I don't want
9 to spend a lot of time on this. I just want to
10 understand how you treated it. There's something called
11 a custom transform.

12 Have you heard that expression?

13 A. I have.

14 Q. And did Microsoft also criticize your report
15 by saying that it believed that in some instances, a
16 customer who does what you just described might do a
17 custom transform, which would strip out the custom tags
18 from XML?

19 A. Yes. I understand that was a criticism they
20 had of Dr. Wecker's survey.

21 Q. Well, how did you address that issue?

22 A. I used some information internally from
23 Microsoft from what they called the Customer Experience
24 Improvement Program or CEIP to try to estimate the
25 amount of customers or users that may have done that.

1 Q. Okay. So tell us a little bit more about
2 that. How did you make that adjustment?

3 A. Well, I looked at both the two products at
4 issue, Word 2003 and Word 2007, and with this
5 information from Microsoft, which is a program where
6 they get volunteers of their customers who, basically,
7 allow Microsoft to track all of their key inputs on
8 their computers to see how they use the Microsoft
9 products.

10 And they have a couple of counters that will
11 tell you if they want to track a certain feature, and
12 one of them was custom transforms.

13 Q. Okay. So did you look at that data, for
14 example, and assume how much difference it would make if
15 all of those reports from the CEIP were non-infringing?

16 A. Well, if everyone who did a custom transform
17 did it in a way that would make the product or the use
18 non-infringing, I would calculate that amount and reduce
19 my numbers by 3-1/2 percent.

20 Q. 3-1/2 percent, assuming that every custom
21 transform reported by this Microsoft CEIP data wasn't
22 infringing?

23 A. Right. That it removed all of the custom
24 tags right at use.

25 Q. In fact, you don't know that, do you?

1 A. No one knows that.

2 Q. So it might be none, or it might be all.

3 A. That is correct.

4 Q. And it makes a 3-1/2 percent difference one
5 way or the other?

6 A. Correct. And I believe it was Dr. Rhyme that
7 opined -- no. It was actually Mr. Gilbane who said that
8 he sees no real practical use to do that; that he
9 doesn't believe that someone would strip out all of
10 those custom tags that cost a lot of time and money to
11 put in and just wipe them out. He didn't understand why
12 that would be done.

13 Q. Okay. So you've already told us about the
14 numbers you got as a result of Dr. Wecker's survey,
15 correct?

16 A. Yes.

17 Q. And you said that you adjusted that number,
18 since it stopped in 2008, to be all the way through the
19 date of this trial, correct?

20 A. I did it through May 15th.

21 Q. And then you applied this 3-1/2 percent
22 higher or lower possibility due to the custom
23 transforms?

24 A. I did.

25 Q. Now, before we leave that subject, what about

1 the CEIP data? This is something that we got in this
2 lawsuit from Microsoft, right?

3 A. You did.

4 Q. And it shows what some of their customers did
5 with some of their software, right?

6 A. It does.

7 Q. Well, why didn't you use that data in
8 determining how many customers infringe?

9 A. Because I read the deposition of the person
10 at Microsoft responsible for this program, Mr. Timothy
11 Diggs -- Briggs, and I don't believe this is a reliable
12 source to estimate the use that's at issue in this case,
13 because the counters they had were not accurate.

14 And also a more important reason is that the
15 universe of people who allow their key strokes to be
16 tracked by Microsoft are not the type of users that
17 would probably be using Custom XML.

18 The type of customer that does that are
19 usually enterprise customers, large businesses with
20 sophisticated businesses and operations, and they are
21 underrepresented in this database.

22 Q. Okay. So this -- this reporting about how
23 customers are using XML, this is a strictly voluntary
24 program?

25 A. Strictly voluntary, and about 1 percent of

1 their customers participate.

2 Q. Okay. And Microsoft doesn't go out and spy
3 on its customers who don't volunteer to participate, do
4 they?

5 A. Oh, absolutely not. They do it for a good
6 purpose, to try to make their product better.

7 Q. Okay. But, in fact, that deposition of the
8 Microsoft person responsible for this program showed you
9 that it's only a fraction of the Microsoft customers
10 that are included in those numbers.

11 A. Right. They have two counters that could be
12 used, and there's problems with both of them, and the
13 number could be in between those numbers, or it could be
14 higher than those numbers, and I can't tell.

15 Q. All right. So tell us, after getting the
16 numbers from the survey and making the adjustment to
17 bring it up through the date of trial, what's the
18 number?

19 A. Well, I calculated a range of damages, based
20 on whether you include or exclude custom transforms, and
21 the reasonable royalty damages are between \$207 million
22 and \$200 million.

23 And those are calculated in Plaintiff's
24 Exhibit 631, which is Schedule 1 of my damage model.
25 And then the other numbers are schedules that support

1 that calculation.

2 Q. So it's 270 million if we assume what about
3 the custom transforms?

4 A. It's 207 million.

5 Q. Sorry. 207 million if we assume what about
6 the custom transforms?

7 A. That those do not eliminate the infringing
8 use.

9 Q. And if you assume that all the custom
10 transforms that Microsoft complains about don't
11 infringe, what's the number?

12 A. 200 million.

13 Q. Okay. Would you say that those are
14 conservative numbers?

15 A. I believe they're conservative.

16 Q. Tell us why that is.

17 A. Well, for two reasons: First, the way that
18 Dr. Wecker conducted his survey. He only got about a 5
19 percent response rate, and so 95 percent of the
20 businesses he contacted did not respond, and he made an
21 assumption that none of those 95 percent would ever use
22 their product in an infringing manner.

23 So I think that's a very conservative
24 assumption to do that.

25 The second reason is that he only surveyed

1 businesses. So he has excluded all of the home use of
2 these products, student use, all individuals who
3 purchased these products.

4 And there's some likelihood that some of
5 those people also use the invention, and we have not
6 calculated any damages for them.

7 Q. Okay. And just, again -- I know that I'm
8 repeating myself, but if you will indulge me and
9 everybody will indulge me for just 30 seconds, I just
10 want to make sure this is crystal clear.

11 Are you saying that Microsoft customers
12 should pay i4i 200 to 207 million?

13 A. No. I don't think you're suing any of those
14 customers; you're suing Microsoft.

15 Q. Okay. So you think that the reasonable
16 royalty for whoever uses Microsoft's product in this
17 case should be paid my Microsoft?

18 A. Yes. And then there will be an implied
19 license to their customers.

20 Q. Mr. Wagner, \$200 million is a lot of money;
21 you agree?

22 A. It is a lot of money.

23 Q. When you do your work and reach a conclusion
24 like this with a significant amount of money as the
25 conclusion, do you do anything to double-check yourself?

1 A. Yeah. I do what's called a reasonableness
2 check.

3 Q. Tell us what that is.

4 A. Well, you want to make sure that what you're
5 doing makes sense when you compare it to some other
6 yardstick.

7 Q. And have you done that in this case?

8 A. I have.

9 Q. Tell us about it.

10 A. Well, I think you showed it in opening
11 statement, that I compared what I'm asking for from the
12 operating profits that Microsoft has earned from the
13 products that are sold in the United States that could
14 potentially practice this invention.

15 Q. Okay. Can you show us what that looks like?

16 A. And this calculation shows that, again, it's
17 a very small piece of a very much larger pie of profits
18 that Microsoft earns.

19 Now, again, this whole pie isn't infringing.
20 They're just products that are capable of infringing.
21 But it's still a very small percentage of that.

22 And based on what I showed you, Microsoft used this
23 functionality to try and sell all of these products,
24 whether the customers used them or not.

25 Q. And have you calculated -- if you're trying

1 to understand the relationship between the amount you
2 believe is a total reasonable royalty and Microsoft's
3 profits from all of its products capable of infringing,
4 what's the -- what's the relationship?

5 A. It's less than 1-1/2 percent.

6 Q. Less than 1-1/2 percent?

7 A. Yes.

8 Q. Thank you, Mr. Wagner.

9 MR. CAWLEY: I'll pass the witness, Your
10 Honor.

11 THE COURT: Cross-examination.

12 MR. LENDER: Thank you, Your Honor.

13 Your Honor, I have some exhibits. May I
14 approach the witness?

15 THE COURT: Yes, you may.

16 CROSS-EXAMINATION

17 BY MR. LENDER:

18 Q. Good afternoon, Mr. Wagner.

19 A. Good afternoon, Mr. Lender.

20 Q. Good to see you again.

21 A. Good to see you, too.

22 Q. You understand that Word 2003 and Word 2007
23 have thousands upon thousands of different features,
24 correct?

25 A. I do.

1 Q. And virtually all of those features have
2 nothing to do with this case, correct?

3 A. I agree with that statement.

4 Q. I actually created a little demonstrative
5 just to try to highlight this point.

6 MR. LENDER: If we could put that up, the
7 first...

8 Q. (By Mr. Lender) And this is a little wheel
9 that I put together of different features included
10 within Word 2003 and 2007, things like spellcheck,
11 saving documents, printing documents, track changes,
12 creating a table.

13 So we're all on the same page, Mr. Wagner,
14 none of these features have anything to do with this
15 case, correct?

16 A. I agree with that.

17 Q. So anytime someone uses any of the features
18 we see up on the screen, they're not accused of
19 infringement in this case, right?

20 A. They are not.

21 Q. And, therefore, i4i is not entitled to any
22 damages for anyone using any of these features.

23 A. That is correct.

24 Q. Now, you also understand that there are lots
25 of features included within both Word 2003 and Word 2007

1 that actually deal with XML that have nothing to do with
2 this case, right?

3 A. I agree with that as well.

4 Q. For example, you understand that the only
5 function included in Word that's relevant to this case
6 is opening a dot XML, dot docx or dot dotm document
7 containing Custom XML in Word, right?

8 A. I do.

9 Q. So, for example, if somebody uses a dot doc
10 file containing Custom XML, you know -- you sat here and
11 heard Dr. Rhyne -- that's not accused of infringement,
12 correct?

13 A. That is correct.

14 Q. So any user who opens a dot doc file
15 containing Custom XML, i4i is not entitled to one dime
16 for that, correct?

17 A. I agree with that statement.

18 Q. And Word ML -- we've heard a little bit about
19 Word ML in this case. That's the proprietary XML, I
20 think, that Microsoft came up with?

21 A. It is.

22 Q. That's also not accused of infringement in
23 this case, right?

24 A. Yes. If it wasn't -- unless it's using
25 custom tags, it's not accused.

1 Q. And you would agree that if I asked a fair
2 statistical sample of people whether they ever bought
3 Word 2003 or Word 2007 because it allowed them to open a
4 dot XML a dot docx or a dot dotm file containing Custom
5 XML and Word, the majority of people wouldn't know what
6 I was talking about, right?

7 A. Unless you did a study, I don't know. I
8 mean, I can have my own belief, but no study like that
9 has been done in this case as far as I know of.

10 Q. And your belief is that the majority of
11 people wouldn't know what I was talking about.

12 A. I agree, because only 2 percent do use it.
13 So I think that's probably a safe assumption, but you've
14 got to prove it scientifically.

15 Q. And we'll talk about the survey, I promise
16 you.

17 Now, you also talked about the
18 Georgia-Pacific factors.

19 A. I did.

20 Q. And you used the Georgia-Pacific factors as
21 part of your analysis?

22 A. Yes.

23 Q. Now, one of the factors you didn't talk about
24 is Factor 10. You know what that factor is about,
25 correct?

1 A. I do.

2 Q. And Factor 10 talks about the benefits of the
3 invention as claimed in the patent, right?

4 A. That's one of the things it talks about, yes.

5 Q. And you'd agree that the fact that companies
6 may have seen benefits from using XML in general is
7 irrelevant to this case, right?

8 A. If they were not, in their mindset, thinking
9 about Custom XML, you are correct.

10 Q. Okay. And, in fact, it's fair to say that
11 you haven't seen -- strike that for a minute.

12 You've examined a lot of documents in this
13 case, right?

14 A. I have.

15 Q. Spent a lot of hours reviewing documents
16 produced by Microsoft documents, documents produced by
17 i4i?

18 A. I did.

19 Q. And, in fact, it's fair to say that you
20 haven't seen a single document where Microsoft has
21 touted the ability to open a dot XML, a dot docx or dot
22 dotm file containing Custom XML; isn't that right?

23 A. That's true. They've never used language
24 that specific. They only talk about Custom XML.

25 Q. And you understand that what I just

1 mentioned, that's what's accused of infringement in this
2 case, right?

3 A. I do.

4 Q. Now, in the last slide when you closed, you
5 put up a pretty big number, and you said that those were
6 the units that were capable of infringing, right?

7 A. You're close. I think that that was profits.
8 There's no units on the last slide.

9 Q. So that was profits. I believe what it said
10 was --

11 MR. LENDER: Well, would you mind putting
12 up the last slide for us, please? Is there a way to
13 switch in the middle?

14 I don't want to misstate the slide, so
15 would you mind putting up that last slide for us?

16 A. The sixth slide has units, if you want that
17 one.

18 Q. (By Mr. Lender) Actually, I just want to show
19 the last slide with that big number with the little
20 sliver.

21 Okay. And this is the document you closed
22 with where you said these were Microsoft's operating
23 profits from all units capable of infringing, right?

24 A. I did.

25 Q. That's the big number you talked about?

1 A. That is -- they're both big numbers, but
2 that's the bigger number, yes.

3 Q. And that big number of units capable of
4 infringing, that's Microsoft's profits from sales of all
5 of Office, correct?

6 A. That's true.

7 Q. And Office includes a lot of different
8 programs that have nothing to do with Microsoft Word,
9 right?

10 A. It depends on how you define lot. It has a
11 number of the other functionalities, principally Excel,
12 PowerPoint, Outlook, and Access.

13 Q. And, in fact, Microsoft Word has thousands
14 upon thousands of features that have nothing to do with
15 the case. You just talked about that, right?

16 A. I already told you that, yes.

17 Q. And you agree that Microsoft's profitability
18 is dependent on many factors that are completely
19 unrelated to the accused functionality; isn't that
20 right?

21 A. I agree with that.

22 Q. And let me make it very clear, because I want
23 to make sure we're all on the same page, you understand
24 that whether or not Word or Office is capable of being
25 used in an alleged infringing manner is completely

1 irrelevant to this case, right?

2 A. I don't believe it's completely irrelevant,
3 no.

4 Q. Well, you understand, let's be clear, that
5 i4i, if they prove infringement, they are only entitled
6 to damages to the extent that people are actually using
7 the accused functionality, right?

8 A. I do understand that, and I've limited my
9 damage calculation to that.

10 Q. Right. They're not entitled to any damages
11 just because the products are capable of being used in
12 an infringing manner.

13 A. They are not.

14 Q. Now, you -- in response to some questions
15 from i4i's counsel, there was a discussion about the
16 student version of Office.

17 Do you remember that?

18 A. Home and student, yes.

19 Q. And Mr. Powers got up in opening, and he said
20 that he just bought a copy of the 2007 version of
21 student, and he paid \$97, right?

22 A. And change.

23 Q. Right. And you agree that's less than what
24 you're asking for in this case, right, per unit?

25 A. I do. If those were the base, I agree my

1 rate would be too high.

2 Q. Well, let's just be clear about one thing,
3 the student version, the 2007 student version of Office,
4 that includes the accused Custom XML functionality
5 that's accused in this case, right?

6 A. It is, and I included that in the capable of
7 infringing units on Slide 6.

8 Q. So for that 97 bucks, if you bought the
9 student version of Office, you'd get the accused XML
10 functionality, as well as all kinds of other things, all
11 the functionality that's not accused in this case,
12 PowerPoint and Excel, right?

13 A. That's correct.

14 Q. Okay. Now, you said that you focused on the
15 business version of Office, which you said was more
16 expensive, right?

17 A. I think that's the type of product that the
18 people that Dr. Wecker surveyed would be using, yes.

19 Q. And you understand that the business version
20 of Office is more expensive because it includes
21 additional programs that are actually not included in
22 the student version of Office, correct?

23 A. It usually includes both Outlook and Access
24 as well.

25 Q. But the accused Custom XML functionality,

1 that's in both products, the more expensive business
2 version and the 97-dollar version of the student
3 version, correct?

4 A. That is correct.

5 Q. And by the way, the price of the business
6 version of Office, I could probably go buy that for,
7 what, about a hundred and fifty bucks?

8 A. You show me where. The list price is 499.

9 Q. Well, you know people don't pay the list
10 price too often, right?

11 A. Not always, but I seem to.

12 Q. Have you ever tried -- have you figured out
13 how much you can pay on Amazon to buy the business
14 version?

15 A. You know, I go to Microsoft's website, so I
16 guess I pay too much.

17 Q. Do you know where Mr. Powers bought his
18 student version of Office?

19 A. I understand on Amazon.

20 Q. Okay. Thank you.

21 Now, what you tried to do in this case,
22 Mr. Wagner, is you tried to calculate damages based on
23 the number of folks that you believe actually used the
24 accused functionality, right?

25 A. That's what I tried to do.

1 Q. And you agree that the amount that customers
2 actually use a particular feature is indicative of its
3 value, right?

4 A. I do.

5 Q. And you're not aware of having ever opened a
6 document containing Custom XML in Word, right, you
7 personally?

8 A. I personally have not done that.

9 Q. You've never even heard of Custom XML before
10 you started working on this case, right?

11 A. That's true.

12 Q. You don't know how many customers have ever
13 purchased Word 2003 or Word 2007 because it allowed them
14 to open a document containing Custom XML in Word, right?

15 A. That information is not known by anyone.
16 Your client doesn't know it; I don't know it. I just
17 know that your client was trying to convince customers
18 to buy the product and how they did that.

19 Q. But sitting here, right here on the stand,
20 you can't identify a single person anywhere in the
21 entire world who bought Word 2003 or Word 2007 because
22 of the accused XML functionality; isn't that correct?

23 A. No, that's not true.

24 Q. That's not true?

25 A. Yeah. I know one person, Mr. Powers. That's

1 the only reason he bought it.

2 Q. Okay. Fair enough.

3 [Laughter.]

4 MR. POWERS: Well, I have a license.

5 Q. (By Mr. Lender) And you can't identify anyone
6 anywhere in the entire world who upgraded to Word 2003
7 or Word 2007 because of the accused XML functionality;
8 isn't that also right?

9 A. That's true.

10 Q. And you certainly didn't buy Word 2003 or
11 Word 2007 because of the accused XML functionality,
12 right?

13 A. I did not.

14 Q. Now, Mr. Wagner, you were sitting in the
15 courtroom when Dr. Rhyme testified and he talked about
16 the issues of direct infringement and indirect
17 infringement, right?

18 A. He did.

19 Q. And you remember, when he was talking about
20 inducement, which is a form of indirect infringement, he
21 talked about the fact that there needs to be evidence
22 that Microsoft directed or encouraged or instructed
23 others to use the accused functionality; isn't that
24 right? Do you remember that?

25 A. I do.

1 Q. Now, the Wecker survey that you rely upon --
2 and we'll get into it in a little bit more detail in a
3 little bit, but the Wecker survey that you relied upon
4 to figure out the number of people who supposedly use
5 this technology -- right?

6 A. Yes.

7 Q. That Wecker survey that you relied on doesn't
8 tell you or tell anyone who opened an XML document
9 containing Custom XML in Word because of any
10 encouragement by Microsoft, right?

11 A. I don't believe that that question was asked,
12 so I do not believe the survey addresses that issue.

13 Q. And the survey also doesn't tell you whether
14 anyone who opened an XML document containing Custom XML
15 in Word did so as a result of some technical assistance
16 they received from Microsoft, right?

17 A. I don't believe the survey addressed that
18 issue either.

19 Q. All right. Let's talk about direct
20 infringement then.

21 Now, in terms of direct infringement,
22 Mr. Rhyme, he put up an interrogatory response that he
23 got from Microsoft.

24 Do you remember that?

25 A. I do.

1 Q. And I think I counted it correctly, but I'm
2 going to walk through it. This is -- I think he talked
3 about four different categories of people at Microsoft
4 who he said had actually used the accused functionality.
5 He first named six people by name. It was Ms. Pratley,
6 Mr. Sunderland, Mr. Little, Mr. Sawicki, Mr. Brian
7 Jones, and Mr. Joe Andreshak.

8 Remember he first came up with those six
9 names?

10 A. I do.

11 Q. Then he had three groups. He said there was
12 one group that could be between 800 and a thousand
13 people, a second group that could be as much as 200, and
14 a third group that could be as much as a hundred.

15 Do you remember that?

16 A. I do.

17 Q. And if I -- I'll give you the benefit of the
18 doubt and give you the maximum. If I add that up,
19 maximum, the maximum number of people that Dr. Rhyme
20 identified who had directly used the accused
21 functionality in Word was 1,306 people, right?

22 A. I'll accept your math, but I don't think he
23 did that; he just accepted Microsoft's information.

24 Q. But that was the only evidence of direct
25 infringement that we saw from Dr. Rhyme in the entire

1 case, right?

2 A. I believe that's correct.

3 Q. And if I take that 1,306 folks and multiply
4 that by your 98-dollar royalty rate, that will get me to
5 a number around \$130,000, right?

6 A. I believe your math is probably correct.

7 Q. And \$130,000 is a lot less than 200 million,
8 right?

9 A. Oh, it certainly is.

10 Q. Okay. Now let's talk about the Microsoft
11 customer experience data that you talked about versus
12 the Wecker survey.

13 A. It's the Customer Experience Improvement
14 Program data.

15 Q. Thank you.

16 Can we just refer to that -- I think we've
17 seen that sometimes as the CEIP data.

18 A. Yes, we can.

19 Q. Make the court reporter happy. We don't have
20 to say it every time, so we'll call that the CEIP data,
21 so you and I will know what we're talking about.

22 A. We do.

23 Q. Now, in coming up with your damages
24 calculations, I know today you only talked about the
25 Wecker survey, but in your expert report, you actually

1 did calculations based on both pockets of data, correct?

2 A. I did.

3 Q. And the Microsoft CEIP data, that's actual
4 data that Microsoft collects as part of its business
5 practices of uses of certain features within Word by its
6 actual customers, right?

7 A. It is.

8 Q. And just so everyone's on the same page, this
9 data, whether it's the Wecker survey or the CEIP data,
10 that doesn't prove anything about infringement, correct?

11 A. By itself, it does not.

12 Q. That's just data that estimates the number of
13 people who may have used the accused functionality in
14 this case, right?

15 A. In an allegedly infringing manner.

16 Q. Okay. And what you have done for purposes of
17 your analysis is that you've just assumed
18 infringement -- infringement, correct?

19 A. Correct. I have no opinion on liability in
20 this case.

21 Q. Right. If the jury were to find that there
22 was no infringement or they find that the patent is
23 invalid, your view would be the damages would be zero,
24 correct?

25 A. There are no damages, and I've wasted

1 everybody's time.

2 Q. Okay. Thank you.

3 Now, you also said that in your view, the
4 CEIP, the Microsoft data, was less reliable. That's
5 what you said?

6 A. I did.

7 Q. Let me ask you this, Mr. Wagner: You know
8 that there's millions of people that actually
9 participate in Microsoft's CEIP data system, correct?

10 A. I think the range is between 2 and 4 million.

11 Q. All right. 2 to 4 million.

12 And how many people, to your recollection,
13 responded to Dr. Wecker's survey?

14 A. Well, I don't think -- well, it was
15 businesses, and I believe that an individual, of course,
16 has to speak for the business, but I think it was 46.

17 Q. Forty-six.

18 And the other thing you mentioned was that --
19 you said that there weren't a lot of large enterprise
20 businesses in the CEIP data. Isn't that what you said?

21 A. Yes.

22 Q. But you can't tell us how many large
23 enterprise companies are included in the CEIP data,
24 correct?

25 A. No. I looked for that information, and it

1 was not produced.

2 Q. But we do know how many large companies
3 actually responded to the Wecker survey, right?

4 A. We do if you define large.

5 Q. How do you define large for purposes of what
6 you said on direct?

7 A. I'd say companies with more than a thousand
8 employees would be an enterprise.

9 Q. Okay. Well, how many of those 46 were
10 responding for more than a thousand employees?

11 A. You'd have to show me his report. I don't
12 remember the details. But I'm going -- my recollection,
13 if I'm refreshed, is maybe three or four of them were in
14 that category --

15 Q. Thank you.

16 A. -- at most.

17 Q. Okay. Thank you.

18 Now, the Microsoft CEIP data, that showed
19 less than 1 percent of users had ever opened a document
20 containing XML in Word, right?

21 A. Well, with the limitations of the counters,
22 yes.

23 Q. Okay. But that data showed less than 1
24 percent?

25 A. It did. It's a range between 2/10ths of a

1 percent and a half a percent.

2 Q. And the survey that was conducted by the
3 expert that i4i hired, Dr. Wecker, that showed that only
4 approximately 2 percent of folks had ever opened a
5 document containing Custom XML in Word; isn't that
6 right?

7 A. Yes, the business customers that he surveyed.

8 Q. So using the Wecker survey, which you talked
9 about today in your direct examination, that would
10 suggest to you that 98 percent of Microsoft users are
11 simply not interested in opening an XML document
12 containing Custom XML in an alleged infringing way,
13 right?

14 A. Well, for the reasons stated in my direct, I
15 think the numbers are higher than that, but I have no
16 ability to quantify it. But at the minimum, that's the
17 number that were using it. And so, yeah, it's possible
18 that 98 percent do not.

19 Q. Okay. And you're not a survey expert?

20 A. No.

21 Q. You're not vouching for the survey sitting
22 here on the stand, right?

23 A. Well, I have no independent verification of
24 Dr. Wecker's work.

25 Q. You have just accepted Dr. Wecker's numbers

1 and then used that as the base for your damages
2 calculation.

3 A. That is accurate.

4 Q. Okay. Now, in this case, what you tried to
5 do was you tried to figure out what Microsoft would have
6 agreed to pay and i4i would have agreed to accept had
7 they actually sat down and negotiated a license for
8 i4i's patent, right?

9 A. That is correct.

10 Q. What you referred to as the hypothetical
11 negotiation?

12 A. Yes.

13 Q. And in your view, that negotiation would have
14 occurred right before the time of the first alleged
15 infringement. And I believe in your report, the date
16 that you said was around October 2003?

17 A. Everything you said is correct.

18 Q. Thank you.

19 And your opinion is that the negotiation
20 would have included both Word 2003 and Word 2007, right?

21 A. I do.

22 Q. And that's your opinion even though Word 2007
23 had not yet been developed, correct?

24 A. Well, it was in development. It, of course,
25 wasn't sold until, I think, January 30th, 2007.

1 Q. And your view is that because of the ease of
2 administration, Microsoft would have wanted to cover
3 everything in one sitdown, correct?

4 A. Yes.

5 Q. Now, in the hypothetical negotiation, there's
6 an assumption that both parties come to the table with
7 full information, correct?

8 A. I agree with that statement.

9 Q. And the result of the hypothetical
10 negotiation is trying to figure out what Microsoft would
11 have agreed to pay and i4i would have been willing to
12 accept, assuming both of them are acting reasonably,
13 correct?

14 A. Yes.

15 Q. And for purposes of your hypothetical
16 negotiation we talked about, you simply assumed
17 infringement, correct?

18 A. That is correct.

19 Q. And you also simply assumed validity,
20 correct?

21 A. Correct.

22 Q. Now, the result of the hypothetical
23 negotiation, what Microsoft gets is simply a
24 nonexclusive license to the patent, right?

25 A. In the United States.

1 Q. Right. They don't get to own the patent,
2 correct?

3 A. They do not.

4 Q. They don't get exclusive rights to the
5 exclusion of anybody else?

6 A. They do not.

7 Q. They don't get -- we've heard a lot about
8 source code in this case. They don't get any of i4i's
9 source code, correct?

10 A. They do not.

11 Q. They don't get any of i4i's technical
12 documents, correct?

13 A. No.

14 Q. All they get is what you referred to in your
15 direct examination as a naked license.

16 A. I didn't say naked, but that's what it's
17 referring to.

18 Q. You've referred to it as a naked license in
19 prior cases, haven't you?

20 A. Well, certainly, and probably in my
21 deposition.

22 Q. And all a naked license means is that
23 Microsoft gets a promise that i4i won't sue them,
24 correct?

25 A. It's a covenant not to sue.

1 Q. Okay. Now, the jury heard some testimony a
2 few days ago from Mr. Cox, and there was a discussion
3 about valuations and about the issue of whether the
4 value of a company can be less than the value to a
5 license to a patent owned by the company.

6 Do you remember that testimony?

7 A. Yes.

8 Q. I want to be clear about something. In your
9 expert opinion, you agree that someone would likely pay
10 less for a nonexclusive license to a patent than they
11 would pay to purchase the entire company that had the
12 rights to that patent, right?

13 A. I would believe that's a reasonable
14 conclusion.

15 Q. And you know that as of October 2003, right
16 in the period of the time when you say the hypothetical
17 negotiation would have taken place, that i4i was headed
18 towards a cliff, correct?

19 A. They had a financial problem, and they needed
20 money, yes.

21 MR. LENDER: Can we put up Exhibit --
22 Defendant's Exhibit 2225?

23 Q. (By Mr. Lender) And I believe you should have
24 a copy of that in your book. Let me know when you're
25 there.

1 A. I'm there.

2 Q. Okay. You've seen this document before, yes,
3 Mr. Wagner?

4 A. I have.

5 Q. And Defendant's Exhibit 2225 is an internal
6 i4i document which was an update for McLean Watson,
7 right?

8 A. Yes.

9 Q. And at this point in time, McLean Watson was
10 considering alternatives for how to deal with i4i,
11 right?

12 A. They were.

13 Q. And if we turn to the second page of the
14 document, you'll see first there's the discussion in the
15 middle that i4i is headed towards a cliff.

16 A. That is the title of the middle section of
17 that page.

18 Q. And that's -- this is in the time and the
19 period of the hypothetical negotiation, October of 2003,
20 right?

21 A. Yes.

22 Q. And McLean Watson -- just so we're all clear,
23 McLean Watson is the -- the bankers who invested in i4i
24 Limited Partnership, the entity that brought this
25 lawsuit, correct?

1 A. Well, it's an investment firm. I don't
2 know -- you can call them bankers. That's a loose term.

3 Q. Okay. Now, if we go down further, there's a
4 section that talks about alternatives going forward.

5 Do you see that?

6 A. I do.

7 Q. And these were alternatives that i4i was
8 considering and McLean Watson was considering in October
9 of 2003, right?

10 A. Yes.

11 Q. And the first one that they were considering
12 was discontinuing operations ASAP, right?

13 A. That is the first one that they have listed.

14 Q. And discontinuing operations ASAP means
15 shutting the doors and going out of business, right?

16 A. It does.

17 Q. Now, the fourth alternative that they were
18 considering in October of 2003 was selling the company
19 to Michel and the employees for a nominal amount.

20 Do you see that?

21 A. I do.

22 Q. And, Mr. Wagner, you understand that a
23 nominal amount is a lot less than \$200 million, right?

24 A. Absolutely.

25 Q. In fact, a nominal amount is a lot less than

1 a million dollars, right?

2 A. It could be.

3 Q. Now, in this case, your opinion is that
4 Microsoft would have agreed to pay a running royalty of
5 \$98 every time one of its customers used the accused
6 functionality, right?

7 A. Every time one of their business customers
8 did so, yes.

9 Q. But you agree and understand that the result
10 of the hypothetical negotiation can be either a running
11 royalty or a lump sum payment, correct?

12 A. That is also a possibility, yes.

13 Q. And what a lump sum means is that rather than
14 getting a royalty every time the product is sold and
15 used in an accused way, that the parties would sit down
16 and agree on an amount upfront, and Microsoft would pay
17 that, and no other payments after that, right?

18 A. That is the nature of the lump sum.

19 Q. And in your hypothetical world, it's your
20 opinion that the parties would have agreed to a running
21 royalty, right?

22 A. Correct, because the best way to compensate
23 for patent infringement is the actual use of the alleged
24 infringer.

25 Q. You know -- that's your opinion in the

1 hypothetical world, even though you know, in the real
2 world, Microsoft seeks lump sum licenses, correct?

3 A. In the real world, outside the context of
4 litigation, that's what they seek.

5 Q. And you also know that in the real world, no
6 one, no one from i4i told you that they would have
7 demanded a running royalty rather than a lump sum from
8 Microsoft, right?

9 A. That is true.

10 Q. Now, Dr. Wagner -- Dr. Wagner -- Mr. Wagner,
11 during your examination, you were asked about the book
12 that you were the coauthor of. It's that book that you
13 talked about that judges had looked at called the
14 Litigation Services Handbook?

15 A. Yes.

16 MR. LENDER: Your Honor, may I approach?

17 THE COURT: Yes, you may.

18 Q. (By Mr. Lender) I brought actually a copy of
19 the latest version that I was able to find. It's -- I
20 guess it's the fourth edition. And I'm going to hand
21 that up to you, and I'm going to ask you, if you
22 wouldn't mind turning to the tabbed page, which is
23 Page 71.

24 MR. LENDER: And for purposes of the
25 record, this document is also Defendant's Exhibit 2351.

1 Q. (By Mr. Lender) Now, it's your opinion that
2 in the hypothetical world, the parties would have agreed
3 to a reasonable royalty --

4 MR. LENDER: If you could just turn to
5 Page 71, please. And if you can turn it to Section --
6 I'm sorry. It's actually on -- why don't you turn up
7 the Page 43 of the exhibit, but it will be the same --
8 the same point.

9 Q. (By Mr. Lender) If you want to look at
10 Exhibit 2351, it's the -- I think 2351 is the 2008
11 supplement.

12 A. I'm sorry. Now you've confused me. What --

13 Q. Why don't you use 2351, which is the later
14 version of that document.

15 A. Oh, I see.

16 Q. And if you go on Defendant's Exhibit 2351 and
17 turn to Page 43. Let me know when you're there.

18 A. I'm there.

19 MR. LENDER: Let's blow up the first
20 paragraph on 43. It's actually 20 in the exhibit.
21 Okay.

22 Q. (By Mr. Lender) Now, it's your claim that the
23 parties would have agreed to a running royalty even
24 though you know and have previously written that the
25 choice between a running royalty and a lump sum, quote,

1 usually depends on the situation, including practices in
2 the industry.

3 MR. LENDER: And, Chris, can you just
4 highlight that sentence, so we all have it?

5 Q. (By Mr. Lender) Right?

6 A. I've written that, and I agree with that
7 statement.

8 Q. And in the actual world, you recognize and
9 understand that the industry practice for large software
10 companies like Microsoft is to enter into lump sum
11 licenses, right?

12 A. It is.

13 Q. Now, in other cases that you've worked on,
14 Mr. Wagner, you've in fact, given opinions that the
15 result of the hypothetical negotiation would be a lump
16 sum, right?

17 A. Under certain fact situations, I have.

18 Q. And it's your view that one of those fact
19 situations is when there's a design-around, correct?

20 A. Yes.

21 Q. Whenever there's a design around the patent,
22 it's your belief that the cost of the design-around is
23 the most amount of money that i4i -- that somebody could
24 ask for in a hypothetical negotiation, right?

25 A. From an economic standpoint, that is my

1 opinion.

2 Q. And that means that in this case, if there
3 is, in fact, a design-around, i4i can't get more money
4 from Microsoft than it would have cost to design around
5 that patent, right?

6 A. If you properly calculate the cost, I agree
7 with that.

8 Q. And a design-around is just a way to
9 restructure your product so that there can't be any
10 question whether it infringes or not, right?

11 A. Right. It doesn't practice the alleged
12 infringed claims.

13 Q. So if it would have cost Microsoft, say, a
14 million dollars to design around this patent so there
15 would be no question on anyone's part that Microsoft
16 didn't infringe, your view would be the reasonable
17 royalty would be a million dollars?

18 A. Yes.

19 Q. Okay. Let's now turn to the doctrine that
20 you referred to, which you called the 25-percent rule.

21 Now, it's your opinion that in the
22 hypothetical world, the parties, when they sat down to
23 negotiate, would have agreed to use the 25-percent rule?

24 A. Yes.

25 Q. Even though you know that in the actual real

1 world, you're not aware of any instance where Microsoft
2 went to the negotiating table with the 25-percent rule
3 in mind, right?

4 A. They have not, based on their monopoly power.

5 Q. Okay. And you also -- you're not suggesting
6 monopoly power in a negative way; you're suggesting that
7 simply as the fact because of their large market share?

8 A. Absolutely not. Microsoft earned its
9 monopoly position by doing it the right way, by doing --
10 making good products and promoting them correctly and
11 dominating the marketplace the way you're supposed to.

12 Q. Thank you.

13 And you know that in the real actual world,
14 i4i also has never gone to the negotiating table with
15 the 25-percent rule in mind, correct?

16 A. I don't think they've ever gone to the
17 negotiating table, except when they did their split-up
18 between two related parties.

19 Q. Right. And in that instance, when i4i, Inc.,
20 sold the patent to i4i, LP, you're not suggesting that
21 they went to the market with the 25-percent rule in
22 mind, are you?

23 A. I have no details, but I would be surprised
24 if they did.

25 Q. Okay. Now, you know that there are lots of

1 experts out there that actually think that there's no
2 basis for applying a 25-percent rule, right?

3 A. Well, it depends on a lot. There are a
4 number of people that do not believe that there's a
5 theoretical or empirical basis for the rule.

6 Q. Including the coauthor of your book, right?

7 A. That's right. It made it very difficult to
8 write this chapter, but Dr. O'Brien, the coauthor of
9 this chapter, and I do not agree on this subject.

10 Q. But you do agree that applying the 25-percent
11 rule can be a real problem when the accused product
12 incorporates lots of different technology that's
13 unrelated to the patent-in-suit, right?

14 A. I agree with that.

15 Q. And you also agree it's problematic to use
16 the 25-percent rule where the product has lots of
17 technologies, because the reason why is that it's
18 difficult to differentiate the contributions of the
19 asserted patent from the contributions of all the other
20 technologies and patents that are included within the
21 product, right?

22 A. Yes. You have an apportionment problem.

23 Q. Now, in other cases you've worked on, there
24 are instances where you have not used your 25-percent
25 rule, right?

1 A. Oh, yeah. There's plenty of cases I did not
2 do that.

3 Q. And a good example of where you might not use
4 the 25-percent rule is where you have a better
5 yardstick, like a comparable license, right?

6 A. That's true.

7 Q. Okay. Let's -- let's -- I want to show you,
8 if I could, Plaintiffs' Exhibit 502. And Plaintiffs'
9 Exhibit 502, which we'll put on the screen --

10 MR. LENDER: Could we try to make that a
11 little bigger?

12 Q. (By Mr. Lender) Plaintiffs' Exhibit 502 is an
13 exhibit that -- it was attached to your expert report,
14 correct?

15 A. It's one of the schedules in my report.

16 Q. And this is the schedule that you used to
17 analyze the 13 different licenses that Microsoft
18 produced to i4i in this case, right?

19 A. Yes.

20 Q. And you agree that the amount that Microsoft
21 has been willing to pay for licenses to patents in
22 actual negotiations in the real world provide some
23 indication of what Microsoft would have been willing to
24 pay i4i in a hypothetical negotiation, right?

25 A. I do.

1 Q. Now, the 13 licenses that you analyzed, I'm
2 correct that the range of those -- first of all, all 13
3 were lump sums, correct?

4 A. They were.

5 Q. Not a running royalty in any of them, right?

6 A. No.

7 Q. And the range of those 13 licenses entered
8 into by Microsoft were between \$10,000 and \$5 million,
9 correct?

10 A. That is the range for the licenses they
11 produced in this case.

12 Q. And the mean or average of those 13 licenses
13 was right around a million dollars, correct?

14 A. That's correct.

15 Q. Now, one of the licenses included within
16 those 13 was a license called the TecSec agreement.
17 That's T-E-C-S-E-C, right?

18 A. It was.

19 Q. And you knew that license was executed in
20 March of 2004, just about -- less than six months after
21 the hypothetical negotiation date, right?

22 A. That's correct.

23 Q. Can we all turn to DTX2246, which is a
24 copy of the TecSec license that you reviewed?

25 MR. LENDER: Can you pull up the DRM,

1 right there, the 1213?

2 Thank you.

3 Q. (By Mr. Lender) Now, you understand that the
4 TecSec relates to something called digital rights
5 management, right?

6 A. I do.

7 Q. And that's also sometimes referred to as
8 information rights management, right?

9 A. It is.

10 Q. And digital rights management was one of the
11 new features that was included in Word 2003, right?

12 A. I think it was also one of the top five
13 features introduced.

14 Q. So when Microsoft was touting new features
15 within Word 2003, you, obviously, showed us some
16 documents where they were touting XML, but it's fair to
17 say that they were also touting this digital rights
18 management functionality, correct?

19 A. That is fair.

20 Q. And digital rights management, that refers to
21 security, correct?

22 A. It does.

23 Q. And security is very important to many of
24 Microsoft's customers, right?

25 A. I'd agree with that.

1 Q. Now, let's turn to Section 2.1 in the
2 license.

3 And 2.1, that's the article that grants
4 Microsoft the license, under the TecSec patents covered
5 under the agreement, correct?

6 A. It does.

7 Q. And the license, what it does is it extends
8 Microsoft a license to use the TecSec patents to what's
9 called Microsoft technologies in existence, correct?

10 A. Yes.

11 Q. So that's what Microsoft got a license for
12 under this license.

13 In other words, what it covers under this
14 license is the technology and the products that are
15 listed in the Microsoft technologies in existence,
16 right?

17 A. Yes.

18 Q. Now, let's look at the definition of
19 Microsoft technologies in existence.

20 MR. LENDER: It's going to be at the
21 beginning of the license.

22 A. Page 2.

23 MR. LENDER: Thank you.

24 Page 2.

25 Q. (By Mr. Lender) And if you go down about

1 two-thirds of the way, you'll see that two of the
2 products that are actually covered under this license is
3 Office 2003, which, of course, includes Word 2003,
4 right?

5 A. It does.

6 Q. So there's no question that the TecSec
7 license actually covers one of the products that's
8 accused of infringement in this case, right?

9 A. One of the two, that's correct.

10 Q. And the TecSec license includes one of the
11 new -- brand new features included in Word 2003 that was
12 touted by Microsoft, right?

13 A. It does.

14 Q. And because this license specifically covers
15 the accused product in this case, you'd agree that a
16 damages expert should give this license more weight,
17 correct?

18 A. I would give it more weight than another
19 license agreement, yes.

20 Q. Now, Mr. Wagner, a license that relates to
21 one of the goals or purposes of the '449 patent, that
22 would also increase the relevance of the license.

23 Would you agree with that?

24 A. Yes.

25 MR. LENDER: Let's just pull up the

1 patent real quick, Plaintiffs' 1 or DTX2001. We both
2 listed it as our first exhibit.

3 Q. (By Mr. Lender) You recognize this as a copy
4 of the '449 patent that's at issue in this case?

5 A. I do.

6 MR. LENDER: And if we could turn to
7 Column 7, Lines 14 to 16.

8 Q. (By Mr. Lender) And you see that what the
9 patent talks about is document security, and what it
10 says is that document security can be significantly
11 enhanced since the metacodes and content of the document
12 are separately stored and protected, correct?

13 A. Yes. That's one of the benefits of the
14 invention.

15 Q. So one of the benefits of the invention is
16 the same benefit of including digital rights management
17 in the product, correct?

18 A. Well, in a totally different way.

19 Q. Right. But they both relate to security,
20 correct?

21 A. Yes, they do.

22 Q. Now, the TecSec license grants Microsoft a
23 license to 70 different patents and patent applications,
24 right? They're all listed on Schedule A?

25 A. You counted them for me in my deposition, and

1 I think that's the number you gave me.

2 Q. And for all of those patents that Microsoft
3 got a license to, in the actual world in that
4 negotiation, Microsoft and TecSec agreed to a lump sum
5 payment of \$3 million, correct?

6 A. They did.

7 Q. That's -- if I did my math correctly, it's
8 about \$43,000 a patent, right?

9 A. I'll accept your math.

10 Q. And you have no reason to believe, sitting
11 here today, that that \$3 million was an unreasonable
12 royalty, correct?

13 A. No. I have no information that tells me it
14 was not, except for this possibly was done in connection
15 with settlement of litigation.

16 Q. Okay. But you have no -- you have no
17 knowledge of that, correct?

18 A. Only by reading Section 7.1 of the agreement.

19 Q. Okay. But you didn't see any testimony in
20 any of the testimony you reviewed or any documents --
21 any of the documents you reviewed, that anyone ever said
22 that the TecSec license was, in fact, the result of a
23 settlement of a lawsuit, correct?

24 A. No. I read the deposition of the Microsoft
25 spokesperson that discuss this, and that fact was not

1 discussed.

2 Q. Okay. Now, given that the TecSec license
3 covers the accused product in this case and also relates
4 to one of the goals of the '449 patent, would you agree
5 that the TecSec license is a comparable license?

6 A. Well, it has some comparability, but there
7 are so many other issues with it that I discussed in my
8 report and my deposition that I did not think that gave
9 me good information.

10 Q. Well, let's put up Page 18 of your report.
11 One of the reasons --

12 MR. LENDER: Let's get it up there.
13 Sorry. Page 18 of his expert report.

14 Q. (By Mr. Lender) And do you need a copy of
15 your expert report?

16 A. No. But I -- hopefully, if he blows it up, I
17 can read it here.

18 MR. LENDER: Okay. Actually, if you can
19 go to the demo. It's the next slide, just to make it
20 easier for everybody.

21 Next page. Okay.

22 Q. (By Mr. Lender) Now, is one of the reasons
23 why you used the 25-percent -- strike that. Let me make
24 this simpler for you.

25 Mr. Wagner, in your report, what you said in

1 your report was that none of the licenses that you
2 reviewed had anything to do with the accused products in
3 this case, right?

4 A. Yes.

5 Q. And you know that's not correct any longer,
6 correct?

7 A. I still didn't think the one line you read
8 out of the patent that deals with this has something to
9 do with security as to why we're here or why this patent
10 is important to Microsoft or i4i. That's not why
11 they're doing it. That's just a side benefit.

12 So I do not think that this makes these
13 patents comparable.

14 Q. So, Mr. Wagner, what you actually wrote was
15 that, To my knowledge, none of the license agreements
16 relate to the licensing of technology for use in
17 Microsoft Word.

18 A. That's true.

19 Q. That's not correct, right?

20 A. That is correct. And we talked about it in
21 my deposition. I agreed that was a mistake, that this
22 one patent, TecSec, did discuss and is used in Word.

23 Q. Okay. Now, let's talk a little bit about the
24 methodology that you used to come up with your damages
25 numbers.

1 MR. LENDER: Can you put up the next
2 slide, please?

3 Q. (By Mr. Lender) Over the course of the work
4 that you've done on this case, you've offered a number
5 of different damages calculations, correct?

6 A. I did. I think maybe there's 18.

7 Q. Actually, if I -- my count is that -- that we
8 have on the slide here, there's actually 23 different
9 damages calculations.

10 A. Okay.

11 Q. And if I look at this right, your damages
12 calculations, your 23, they range from 22 million all
13 the way up to 207 million, right?

14 A. That's correct.

15 Q. And some of these calculations actually
16 corrected errors that you had made in your earlier
17 calculations -- calculations, which were pointed out by
18 our damages expert, Keith Ugone, right?

19 A. Well, he corrected one error. He did it
20 incorrectly. I made the correct change, and that's
21 true; I made one change to the profitability of
22 Microsoft.

23 Q. So one of the changes you made to your
24 damages calculations was, in fact, to address the issue
25 of double-counting; isn't that right?

1 A. Well, possible double-counting.

2 Q. And you knew about the issue of
3 double-counting before you issued your original report,
4 right?

5 A. I did.

6 Q. But it was only after you read our expert's
7 report where he pointed out the fact that you
8 double-counted that you changed the calculations, right?

9 A. Yes.

10 Q. Now, some of the damages calculations that we
11 see on the screen rely on Microsoft's CEIP data, and
12 then there are others that rely on the Wecker survey,
13 right?

14 A. I think you did put them in different colors,
15 yes.

16 Q. And if we just look at the Microsoft CEIP
17 data, your view, if I go to the bottom section, the
18 damages range is now between 22 million and 56 million.

19 A. If you look at the very bottom quadrant, yes.

20 Q. Okay. But using the Wecker survey, your
21 damages number is between 199 -- I'm sorry -- between
22 200 -- 199 and 207 million, right?

23 A. That is correct.

24 Q. And that's the range we're talking about.

25 A. Yes. And you shouldn't really -- it's unfair

1 to characterize this as double-counting. There's no
2 double-count in Dr. Wecker's. That's not appropriate.

3 Q. Okay. Well, sitting here today, you can't
4 actually tell us which of these damages numbers is
5 actually the right one to use, based on your
6 methodology, right?

7 A. Well, I think I told the jury I think both of
8 them understate, dramatically, use. So if I had to
9 choose as a professional, I'd choose Dr. Wecker's
10 because of the many problems wrong with the CEIP data.

11 Q. Okay. But you have no opinion, sitting here
12 right now, as to whether the Wecker survey data or the
13 Microsoft CEIP data is more reliable, right?

14 A. Well, I believe Dr. Wecker's is more
15 reliable.

16 Q. Okay.

17 MR. LENDER: Your Honor, may I approach,
18 please?

19 THE COURT: Yes, you may.

20 Q. (By Mr. Lender) Here's a copy of your
21 deposition, Mr. Wagner, that I took on January 27, 2009.
22 Mr. Wagner, if we turn to Page 79 of your deposition,
23 Line 8 to 14, I asked you these questions, and did you
24 give me these answers?

25 QUESTION: What do you think is -- is

1 more reliable, the survey data or the CEIP data?

2 ANSWER: I don't think I have an
3 independent opinion on the subject.

4 QUESTION: In the hypothetical.

5 ANSWER: I think -- personally, I think
6 they're both usable in my experience as a damages
7 expert.

8 That was your testimony, right?

9 A. It was.

10 Q. So since they're both usable and they're
11 equally reliable, it's your opinion that any number
12 between 22 million and 207 million could, in fact, be
13 the right damages number, right?

14 A. Depending on what the jury finds as what is
15 infringing and what is not infringing.

16 Q. And if the jury were to find, after hearing
17 from Dr. Wecker, that the Wecker survey is unreliable or
18 unbelievable, then you would say that the damages range,
19 the appropriate damages range, at least to start our
20 discussions, would be those numbers based on Microsoft's
21 CEIP data.

22 That would be the number between 22 million
23 and 56 million, right?

24 A. That would be the only choice we would have
25 left.

1 Q. Okay. Let's talk a little bit about XMetaL,
2 your benchmark.

3 To come up with your damages calculation, you
4 relied on a third-party product called XMetaL, which you
5 told the jury had a list price of \$499, right?

6 A. It's XMetaL for Author, yes.

7 Q. And Microsoft has never sold the XMetaL
8 product, correct?

9 A. They only purchased it; they never sold it.

10 Q. And i4i has never sold the XMetaL product,
11 correct?

12 A. No.

13 Q. And let me just talk for a moment about your
14 personal experiences with the XMetaL product.

15 You've never used the XMetaL product in your
16 entire life, correct?

17 A. I personally have not.

18 Q. You've never spoken to anyone in the whole
19 world who's ever used the XMetaL product, right?

20 A. That is correct.

21 Q. You've never studied or even seen the XMetaL
22 product, right?

23 A. Well, I've studied information about it, but
24 I've never seen the product myself.

25 Q. Okay. And you don't personally know whether

1 XMetaL uses the accused functionality at issue in this
2 case, right?

3 A. I did not.

4 Q. You do understand, however, that XMetaL is
5 not strictly a custom XML application, right?

6 A. That is true.

7 Q. XMetaL contains, for example, many general
8 word processing functionalities, right?

9 A. Which are totally and necessary if you use it
10 as an add-on to Word.

11 Q. In fact, XMetaL includes lots of
12 functionalities that have nothing to do with opening
13 documents containing custom XML and Word; isn't that
14 right?

15 A. I agree with that.

16 Q. And you've made no attempt to allocate the
17 list price of XMetaL among all of these different
18 functionalities that are included within XMetaL, right?

19 A. That's not true. If you want to again turn
20 in my deposition to Page 173, I told you I didn't do it
21 quantitatively, but I did do it judgmentally in both
22 selecting my starting point and reaching my conclusions.

23 Q. Well, let's be clear about a couple of
24 things, Mr. Wagner.

25 You have no idea what caused any customer

1 anywhere in the world to purchase the XMetaL product;
2 isn't that right?

3 A. That's true.

4 Q. And despite all of this, you used the '499
5 full list price of XMetaL, right?

6 A. I did.

7 Q. And sitting here today, you can't tell us how
8 often anyone has paid the list price for XMetaL, right?

9 A. No. I have no information from them as to
10 actual sales price.

11 Q. In fact, you don't even know whether anyone
12 anywhere in the world has ever paid the list price for
13 XMetaL, right?

14 A. I have no information on that subject.

15 Q. And you don't know how many units of XMetaL
16 have ever been sold, correct?

17 A. No.

18 Q. Now, let me just make sure I've got the
19 methodology right.

20 Using XMetaL as the benchmark, your
21 methodology was to take the full list price of XMetaL,
22 the full \$499, multiple that, not by the profitability
23 of XMetaL but the profitability of Microsoft, and then
24 you took 25 percent of that number to come up with \$96?

25 A. That's how I got my starting point.

1 Q. And then you looked at the Georgia-Pacific
2 factors, which we'll talk about shortly, and you bumped
3 it up 2 more dollars to \$98, right?

4 A. That was my conclusion.

5 Q. Let's talk about another potential benchmark.
6 You understand that when Microsoft was pricing its 2003
7 version of Office, it decided to price the Professional
8 version of Office at a price point \$50 higher than the
9 small business version of Office, correct?

10 A. That's accurate.

11 Q. And it's your opinion that most of that
12 50-dollar difference between the small business and
13 Professional versions of Office is due to the custom XML
14 included in the Professional version of Office, right?

15 A. I think that's one of the major reasons, yes.

16 Q. And that's your opinion.

17 And in addition -- you know in addition to
18 the custom XML functionality, there are actually lots of
19 other differences in the two products, right?

20 A. I do.

21 Q. Just to give one example, the Professional
22 of Office contains an additional program called
23 Access, which is actually not included in the small
24 business version, right?

25 A. I understand that.

1 Q. Let's put those differences -- all those
2 other differences to the side. Let's just focus on the
3 accused custom XML functionality, okay?

4 Let's assume for argument's sake that you're
5 actually right, that most of that 50-dollar differential
6 in the real world is due to the custom XML functionality
7 included within Word within the Professional version of
8 Office, okay?

9 Did you ever do a calculation -- you talked
10 about reasonable -- reasonableness checks. Did you ever
11 do a calculation to see what your damages analysis would
12 have looked like had you used a 50-dollar price
13 differential as the benchmark rather than XMetaL?

14 A. No, because I read the deposition of the
15 Microsoft's spokesman on this issue, and he testified
16 that Microsoft does not charge these differential prices
17 based on features.

18 So if I had done that, you would have
19 criticized me for doing it. It's actually totally
20 irrelevant as a data point.

21 Q. So your view is that we would have criticized
22 you for using the 50-dollar differential that you claim
23 was caused by accusing the accused custom XML
24 functionality rather than using a completely unrelated
25 product that costs ten times that?

1 That's your testimony?

2 A. It's not an unrelated product. It is
3 actually the closest yardstick in the market as of the
4 date of the hypothetical to show the type of
5 functionality that not only Microsoft internally was
6 using itself at the time because they didn't have that
7 functionality in Word, but like they would offer
8 themselves.

9 The internal statements that Microsoft say
10 they can't wait for Microsoft to have this functionality
11 inside their product so they don't have to use XML
12 anymore.

13 Q. But, Mr. Wagner, you conceded; you said just
14 a moment ago that you have no idea whether XMetaL
15 actually includes the accused custom XML functionality.

16 Isn't that still your testimony?

17 A. No. My understanding is that custom
18 capabilities -- my client has a study to see if it
19 infringes. I'm not going to claim it infringes, if I
20 don't know.

21 Q. Okay. Well, do you have any sense of what
22 the damages would look like, if we had used the
23 50-dollar differential rather than the price -- the full
24 list price of XMetaL?

25 A. I know Dr. Ugone did that. At one time, I

1 read it, but I didn't commit it to memory.

2 Q. Well, I wasn't sure whether you would say
3 that or not, so I did. So let's take a look. Let's
4 first put up his calculation.

5 MR. LENDER: Put up the products slide,
6 please.

7 Q. (By Mr. Lender) This is the calculation that
8 you did we just walked through. Start with the XMetaL
9 benchmark of 499, multiple that by Microsoft's
10 profitability. That's for Office, right, for 76
11 percent.

12 Multiply by the 25-percent rule; get to \$96;
13 add the 2-dollar for Georgia-Pacific; we get to 98.
14 And then in this example to get to your 207-million-
15 dollar number, I used the numbers that you provided
16 based on the Wecker survey updated through May 15th.

17 All right. And that's how you came up with
18 \$207 million, right?

19 A. That is correct.

20 Q. Now, if I actually replaced that 499 from
21 XMetaL and instead used a 50-dollar differential that
22 you said was because of the custom XML functionality,
23 that 207-million-dollar number drops all the way down to
24 24.4 million, right?

25 A. It does, but this does not -- this is not

1 logical.

2 Q. This is not logical; this is not what happens
3 if I take the 499 and replace it with 50? Are you
4 saying this math is not correct?

5 A. No. The math is correct, but the logic
6 underlying it doesn't make sense.

7 And the reason for that is that this is --
8 this is the difference for all products sold by
9 Microsoft whether they infringe or not. The 400 million
10 users of Office would pay this 50 million
11 differential -- or 50-dollar differential in order to
12 get this additional functionality.

13 My 499 only applies to people who really want
14 to use the infringing technology, not to everyone like
15 this calculation assumes.

16 Q. Okay. Well, let me ask you this. Let's
17 say -- do you have any idea what would happen to this
18 same calculation if instead of using the 499 XMetaL list
19 price, I used a 50-dollar differential that you said was
20 the result of concluding the accused custom XML
21 functionality in Word, and instead of using the Wecker
22 survey numbers, I used the other data, the CEIP data
23 that you said was equally reliable?

24 Do you know what happens to these numbers?

25 A. I am certain they're smaller.

1 Q. Okay. Let's see what happens. I'm going to
2 take the Wecker survey now and take out the 2.1 million
3 units. And first, I'm going to show you, based on the
4 lower counter, which actually, under your analysis using
5 the lower counter, would be only 227,000 units accused
6 of infringement.

7 That gets me to a damages number of 2.6
8 million, correct?

9 A. I assume that math is correct.

10 Q. In fact, even if you use the higher number
11 that you talked about in your report --

12 MR. LENDER: Next slide, please.

13 Q. -- that would just get us to 6.8 million,
14 right?

15 A. It would.

16 Q. Let's talk about Factor 5 for a minute.

17 MR. LENDER: Just leave that up for now.

18 Q. (By Mr. Lender) Let's talk about Factor 5 for
19 a minute.

20 MR. LENDER: Actually, you can take it
21 down.

22 Q. (By Mr. Lender) Let's talk about Factor 5.
23 Factor 5 was the issue where you testified that i4i and
24 Microsoft are not competitors, right?

25 I'm sorry. Are competitors.

1 A. No, I said they are competitors.

2 Q. Are competitors. Thank you.

3 And you stated -- I think you said you put up
4 the obsolete e-mail, the one that we saw in opening, and
5 you said that Microsoft rendered i4i's product obsolete,
6 right?

7 A. Yes, for 80 percent of the market.

8 Q. Okay. You were sitting here when Keith
9 Thomas testified, and I asked him the same question, and
10 Keith Thomas actually testified to the opposite. He
11 said that we have not rendered their product obsolete,
12 correct?

13 A. Yes, but I think he was talking about the
14 vertical market in pharmaceuticals where the Microsoft
15 Word product, even with this functionality, was not
16 powerful enough for some customers. But that's a very
17 small subset of the potential customers that i4i could
18 sell to.

19 Q. Well, I guess the record will just reflect
20 what it reflected.

21 Now, despite now stating in this trial that
22 Microsoft and i4i are competitors, it's fair to say that
23 you can't identify a single document where i4i stated
24 that it considered Microsoft to be a competitor, right?

25 A. Except for what I said in my deposition,

1 that's true.

2 Q. Okay. And that's, in fact, what you did say
3 in your deposition, right?

4 A. Well, what I said was I did see a document; I
5 read a deposition, which is a document where the
6 executives say they were -- they were competitors.

7 Q. Okay. But no documents in the millions of
8 documents that have been produced in this case, you
9 didn't see any contemporaneous documents where i4i said
10 that it considered Microsoft to be a competitor,
11 correct?

12 A. That's true.

13 Q. And, in fact, you were also here -- you were
14 here for the whole trial so far, right?

15 A. I have.

16 Q. So you were here when Mr. Powers was
17 cross-examining Mr. Cox where it came out that, in fact,
18 i4i's losses went down after Word 2003, right?

19 A. I was here.

20 Q. Now, you reviewed certain deposition
21 testimony in this case in connection with the opinions
22 you're giving today, right?

23 A. I did.

24 Q. And you determined which depositions you
25 should read based on requests by your staff to i4i's

1 lawyers, and i4i's lawyers saying to you and your staff,
2 you know, you should really read this particular
3 deposition, right?

4 A. Both of those ways is how information comes
5 to me.

6 Q. Okay. And, of course, any testimony of an
7 i4i witness where they said they did not perceive
8 Microsoft to be a competitor, that's the kind of
9 testimony you would have liked to see, right?

10 A. It is.

11 Q. Now, let's talk a little bit about one of
12 i4i's witnesses in this case, Richard Owens.

13 You know that Richard Owens was a member of
14 the Board of Directors of i4i from the period of the
15 late 1990s through 2006 or 2007, correct?

16 A. I don't recall exact dates, but I know he was
17 a member of the Board.

18 Q. And was Richard Owens -- was that one of the
19 depositions that you reviewed in connection with the
20 opinions you're giving in this case?

21 A. No.

22 Q. Let me read for you, if I could, a section
23 from Richard Owens' deposition. And what I'm going to
24 read is Page 193, Line 20 to 194, Line 24, okay?

25 QUESTION: Do you know who i4i's competitors

1 were from the years 2002 to 2007?

2 ANSWER: No. I know it to the extent I was
3 told. I don't remember.

4 QUESTION: Do you have any recollection of
5 major competitors that i4i had in 2002 to 2007?

6 ANSWER: There were two classes of
7 competitors. Open Text, as a broad document management
8 solution, was one that occurs to me.

9 Okay. But I remember in board meetings
10 others would be mentioned in competitions for large
11 contracts, but they were firms that I only heard of once
12 or twice in that context, and I do not recall their
13 names.

14 QUESTION: So other than Open Text, you don't
15 remember any competitor from 2002 to 2007 that
16 significantly impacted i4i's ability to achieve success
17 in the marketplace?

18 ANSWER: No, I do not.

19 QUESTION: And as a member of the Board of
20 Directors, that's the kind of information you would have
21 been exposed to?

22 ANSWER: Sure.

23 QUESTION: You never heard of Microsoft
24 referred to as a competitor in the space for i4i's
25 product?

1 ANSWER: Not that I recall, no.

2 Mr. Wagner, Richard Owens, that testimony,
3 that would have been some of the types of testimony you
4 would have liked to have known about before you gave
5 your opinion that Microsoft and i4i were competitors,
6 right?

7 A. It is, and I wished you would address that
8 with him at trial so that we could find out what he
9 meant by that.

10 Q. And, Mr. Wagner, if the jury actually
11 concludes that Microsoft and i4i are not competitors,
12 under your analysis, it would cut your royalty rate in
13 half, right?

14 A. Approximately, that would be true.

15 MR. LENDER: Chris, can you put back up
16 our little slide for a minute. Let's just see where we
17 are.

18 Q. (By Mr. Lender) This is the slide that did
19 the damages calculation using the 50-dollar differential
20 that you testified was the result of the accused custom
21 XML functionality and the Microsoft CEIP data that you
22 testified was as reliable as the Wecker survey.

23 A. No. You're mischaracterizing my testimony.
24 I'm sorry. I never said that was the cause.

25 We talked about that. I did not use that. I

1 understood from Microsoft's witnesses that that is not
2 an appropriate analysis, and I did not do it. So that
3 is not properly representing my testimony.

4 Q. Okay. But if I take that -- if I assume for
5 argument's sake that we're not competitors and the jury
6 believes that Microsoft and i4i are not competitors, I
7 take that royalty rate and I cut it in half.

8 And you know what happens to damages if I cut
9 it in half?

10 A. That 2.6 would be 1.3. I can do that math.

11 Q. Well, let's just put the slide up, 1.3.
12 And what happens with the larger CEIP data number that
13 you relied on?

14 A. Again, it's going to be cut in half.

15 MR. LENDER: Let's put that up, please.

16 A. That's 1.7.

17 Q. (By Mr. Lender) Okay.

18 MR. LENDER: 3.4, right?

19 Now, can we put up -- if we could, can we
20 please put up --

21 A. Oh, I'm sorry. You already did the half. I
22 took the half of a half. You're right; it's 3.4.

23 Q. (By Mr. Lender) Now, Mr. Wecker (sic), part
24 of your damages analysis was to include additional
25 damages for the period of time from November 2008, the

1 date of the Wecker survey, through the date of trial,
2 right?

3 A. I did.

4 Q. And it's your claim that every single day
5 there are new people that are out there that are using
6 the accused functionality for the very first time,
7 right?

8 A. Yes -- no -- yes, that's correct.

9 Q. But you don't actually know how many new
10 people, for example, today have actually used the
11 accused functionality for the very first time, right?

12 A. I don't.

13 Q. In fact, you can't name a single person
14 anywhere in the world who has actually used the accused
15 functionality for the very first time since the date of
16 the Wecker survey, right?

17 A. I cannot.

18 Q. Now, I think it was last week we got copies
19 of some new schedules that you provided, which updated
20 this additional damages through May 15th. And I'm just
21 going to put up a demonstrative. This comes from
22 Plaintiffs' Exhibit 631.

23 But you gave us actually two completely
24 different calculations. What you said is that the
25 number of new people that have actually used the accused

1 functionality for the very first time, since November
2 2008, could be either 262,282 people or 50,788 people,
3 right?

4 A. Those calculations are in my report, yes.

5 Q. Now, let me ask you this: The difference
6 between those two numbers, 262,282 or 50,788, that
7 results in a big addition; that differs to your damages
8 number, right?

9 A. Well, it's the difference times \$98.

10 Q. Right. And if I take that differential --

11 MR. LENDER: Next slide, please.

12 Q. (By Mr. Lender) -- and multiply that by \$98,
13 using the bigger number actually increases the damages
14 by more than \$20 million, right?

15 A. According to your calculation, \$25.7 million.

16 Q. And if I use the lower number, it's actually
17 only 4.9 million, right?

18 A. Correct.

19 Q. And in your damages calculation, the one that
20 you said to the jury where you asked for 200 million,
21 you used the bigger number, right?

22 A. I did.

23 MR. LENDER: Okay. You can put that
24 down.

25 Q. (By Mr. Lender) Let's talk a little bit about

1 the Wecker survey. I think I actually wrote this down
2 almost verbatim.

3 What you said to the jury was that this
4 survey -- that surveys are the kind of data that experts
5 in your field typically rely on. Isn't that what you
6 said?

7 A. Yes.

8 Q. But the fact is that in your experience,
9 that's not true, right?

10 A. Well, it's not common, because I have data
11 that I don't need it. But anytime I need that type of
12 information, I rely on surveys.

13 Q. Mr. Wagner, in your experience, it's fair to
14 say that surveys done by experts are rarely very useful
15 to you, right?

16 A. That's often been my experience.

17 Q. In fact, it's been your experience that when
18 you see surveys, even ones done by reputable survey
19 experts, that they often ask the wrong questions, right?

20 A. That's true.

21 Q. Now, you had no involvement in conducting the
22 Wecker survey that you rely upon, correct?

23 A. That is correct.

24 Q. You never spoke to Dr. Wecker about the
25 survey, right?

1 A. No.

2 Q. And you understand we talked about before
3 that Dr. Wecker only got 46 companies to respond to the
4 survey, right?

5 A. That is correct.

6 Q. And you don't know whether any of the 46
7 people who responded to the survey were capable of
8 answering the questions that were asked in the Wecker
9 survey, right?

10 A. I have no knowledge on that subject.

11 Q. Now, in relying on a survey that's supposed
12 to show the amount of alleged infringing use, you would
13 agree that it's important to make sure that the people
14 who are responding understood the questions that were
15 being asked, right?

16 A. Yes.

17 Q. And if the survey questions resulted in
18 including uses that did not infringe i4i's patent, under
19 their theory of the case, that would raise questions in
20 your mind about the reliability of the survey, right?

21 A. That is correct.

22 Q. But if you're talking for purposes of the
23 survey, you just took those numbers and used it for your
24 base, correct?

25 A. I did.

1 Q. Now, one of the factors in the
2 Georgia-Pacific analysis that you talked about was
3 Factor 6, right?

4 A. I did.

5 Q. And Factor 6, that's the fact that -- what
6 you're saying is that somehow a sale -- that by
7 encouraging sales of custom XML in Microsoft Word, that
8 it promoted sales of other products?

9 A. Possibly Microsoft Office, yes.

10 Q. But you can't point to a single transaction
11 where that actually happened, right?

12 A. I think you've already asked me that. I have
13 no information on the motivation of actual purchasers.

14 Q. Okay. Now, you also spent some time talking
15 about Georgia-Pacific Factor No. 11.

16 Do you remember that?

17 A. I do.

18 Q. And Georgia-Pacific Factor 11, that talks
19 about the extent to which Microsoft has used the
20 invention as specifically claimed in the patent, right?

21 A. It does.

22 Q. In none of the documents you talked about in
23 connection with this factor specifically discussed
24 opening certain types of documents containing custom XML
25 in Word, right?

1 A. No. They only talk about the importance of
2 custom XML.

3 Q. None of the documents mentioned Mr. Vulpe or
4 Mr. Owens?

5 A. No.

6 Q. None of the documents discussed i4i's '449
7 patent?

8 A. No.

9 Q. None of the documents you reviewed actually
10 tied what Microsoft was doing with custom XML to i4i,
11 correct?

12 A. They didn't tie what's alleged as the
13 infringing use in this case in any of the documents that
14 I saw.

15 Q. None of the documents you reviewed tied
16 anything that Microsoft was doing with custom XML to
17 i4i, correct?

18 A. Correct.

19 Q. Now, there were three Factor 11 documents I
20 think you talked about, and I'd like to briefly just go
21 through each of them.

22 The first one you mentioned was Plaintiffs'
23 Exhibit 212.

24 MR. LENDER: Can you blow that up? And
25 if you can just blow up Paragraph No. 1.

1 Q. (By Mr. Lender) And I believe the
2 demonstrative you showed actually highlighted only some
3 of this language. You highlighted the part that said:
4 We love XML, especially arbitrary or customer-defined
5 XML.

6 You also highlighted: We emphasize
7 custom-defined schemas, because we truly believe in all
8 our hearts that that is what the future is.

9 Do remember that seriously?

10 A. I do.

11 Q. I want to ask you about the paragraph that
12 you weren't asked to look at, which is on the second
13 page.

14 MR. LENDER: If you can just blow up
15 Paragraph 7.

16 Q. (By Mr. Lender) I'm going to ask you -- I'm
17 going to read this. Then I'm going to ask you a
18 question about it.

19 Here's what the document -- this author,
20 Chris Pratley, also wrote in Paragraph 7: If we were
21 trying to impose a new file format on users, we would
22 default to a new format, and that would be that.

23 Instead, we default to dot doc, because that
24 is what 300 million people out there today use and can
25 read.

1 If we defaulted to some new XML format, they
2 would have a problem, and customers who got 2003 would
3 have a problem working with them. Since Word ML is not
4 about, quote, new file format to us, we do not use it as
5 a default.

6 XML is quite weak as a file format compared
7 to binary in many ways, although we love its portability
8 and accessibility.

9 You have no reason to deny or disagree with
10 this statement, correct?

11 A. Oh, no. That's what I thought at the time,
12 but then Microsoft changed their opinion when 2007 came
13 out, and they did default to an XML format.

14 Q. This is what they were -- but at the time of
15 the hypothetical negotiation in 2003, this is what
16 Microsoft was thinking, right?

17 A. That's what they were thinking with that
18 document at that time.

19 Q. And just so we're clear, you know --

20 MR. LENDER: Your Honor, may I approach
21 the easel?

22 THE COURT: Yes, you may.

23 MR. LENDER: I just want to, again,
24 remind everybody, this is the easel -- oh, excuse me --
25 that Mr. Powers and Mr. Rhyne went through.

1 Q. (By Mr. Lender) Looking at No. 1, you know
2 that the dot doc file that Mr. Pratley is talking about,
3 in that document with custom XML, that's not accused of
4 infringement in this case, right?

5 A. I am aware of that fact.

6 Q. Let's go to the next one, PX183, and if you
7 could turn to the second page of that document. This is
8 another one from Chris Pratley.

9 I believe you read to the jury the part where
10 he talked about a cust -- customer-defined schemas is
11 more like 90 percent of the value.

12 Do you remember -- do you remember reading
13 that to the jury?

14 A. I do.

15 MR. LENDER: Would you pull that up,
16 Chris, so we can see it?

17 Top of the second page.

18 Q. (By Mr. Lender) See it right there, the last
19 line, it is more than 90 percent of the value, that's
20 what you read to the jury, right?

21 A. It is.

22 Q. You know that when Chris Pratley wrote this,
23 he wasn't thinking about the accused functionality,
24 correct?

25 A. No. He's thinking more generally of just

1 offering custom XML.

2 Q. And you know and you agree that if
3 Mr. Pratley was referring to functionality regarding
4 custom XML that was unrelated to the accused
5 functionality, that would change your 90-percent
6 opinion, right?

7 A. It would.

8 Q. Okay. Last document you talked about was the
9 glue document. This was Plaintiffs' Exhibit 215.
10 Remember, you mentioned the glue document when you were
11 talking to the jury?

12 A. I do.

13 Q. And you know that when this document is
14 talking about the glue -- the glue document, this,
15 again, is not talking about the accused custom XML
16 functionality, correct?

17 A. It's a broader statement than that, yes.

18 Q. It's talking about all of the functionality
19 that Microsoft is offering with XML and throughout the
20 entire product offer, right?

21 A. That is correct.

22 Q. And you knew that XML is used in all kinds of
23 programs that have nothing to do with Word, correct?

24 A. I do.

25 Q. Now, Mr. Wagner, you agree that the amount of

1 sales that i4i has made in selling its products provides
2 some indication as to the value of the accused
3 functionality, correct?

4 A. It does.

5 Q. You also agree that the amount of profits
6 that i4i has earned in selling its products provides
7 some indication as to the value of the accused
8 functionality, right?

9 A. That is correct.

10 Q. And in the real world, you know that in the
11 11-year period from its inception in 1993 to 2003 that
12 i4i lost in the neighborhood of \$25 million, right?

13 A. They did.

14 Q. And, in fact, just in the three-year period
15 right up to the hypothetical negotiation, they lost more
16 than \$9 million, right?

17 A. I believe that's correct.

18 Q. And we already talked about it a moment ago.
19 At the time of the hypothetical negotiation in October
20 of 2003, would you agree it's fair to say that i4i was
21 in financial crisis?

22 A. I think they clearly were in financial
23 crisis.

24 Q. For example --

25 MR. LENDER: Just DTX 2235. Just pop the

1 top part.

2 Q. (By Mr. Lender) This is a memo that you
3 reviewed in connection with your opinions that you gave?

4 A. Yes.

5 Q. And this is a memo that was written by Stuart
6 Angus, the President; John Anhang, the CFO to the
7 Directors for i4i?

8 A. Yes.

9 Q. And given who wrote this document, you would
10 expect it to be pretty accurate, right?

11 A. I would.

12 Q. Now, you also were aware that i4i was
13 experiencing quality problems, right?

14 A. Well, I heard the testimony on that, and I
15 have read some documents on that subject, yes.

16 Q. And Microsoft and i4i would know all about
17 these quality problems and all these financial problems
18 when they sat down to negotiate the hypothetical
19 license, correct?

20 A. All the information would be known by both
21 parties, yes.

22 Q. In fact, you would expect that Microsoft
23 would try to use them to try to negotiate a lower rate,
24 right?

25 A. I think clearly they would do that.

1 Q. And you also understand that in a
2 hypothetical negotiation, Microsoft would be aware of
3 the valuation that i4i put on its company, right?

4 A. They would.

5 Q. And you're aware -- it's been talked about a
6 few times today that right around the time of the
7 hypothetical negotiation, McLean Watson thought the
8 value of the company was only \$2 million, right?

9 A. Well, I think it was unclear who thought
10 that, but that is an indication of value.

11 MR. LENDER: Would you put up
12 Exhibit 2088?

13 Let's blow up the bottom part first.

14 Q. (By Mr. Lender) Okay. The bottom part is an
15 e-mail that is written by Michel Vulpe to Loudon Owen,
16 and he writes that the value of the company at the end
17 of the process appears to be \$2 million?

18 A. He does say that under Point 2.

19 Q. Okay. And this memo -- this e-mail was
20 written in December of 2003, right around the period of
21 the hypothetical negotiation, right?

22 A. That's true.

23 Q. And if we go to the top e-mail, this is the
24 response by Loudon Owen to -- from McLean Watson to
25 Michel Vulpe.

1 What he says is that the 2-million-dollar
2 valuation of the company is probably not that far off,
3 given the tax loss value, correct?

4 A. That is correct.

5 Q. Now, you also know that McLean Watson, in
6 fact, prior to the hypothetical negotiation, they wrote
7 down the amount of their investment, right?

8 A. They did.

9 Q. They had invested \$10 million in the company,
10 and by the time of the hypothetical negotiation, they
11 wrote down that investment by 99 percent to just a
12 hundred thousand dollars, right?

13 A. They did.

14 Q. And one of the reasons why they did that was
15 because they were -- they had concerns about i4i's
16 ability to continue as a going concern, right?

17 A. They did.

18 Q. And the issue about whether a company can
19 continue as a going concern, that means that there's
20 questions about whether the company can continue in
21 business, right?

22 A. Yes, over the next 12-month period.

23 Q. Okay. And that going concern, that was in
24 the period of around the time of the hypothetical
25 negotiation, right?

1 A. It was.

2 Q. Okay. The last thing I want to talk to you
3 about real quick --

4 MR. LENDER: Can we put up Exhibit 364,
5 Plaintiffs' Exhibit 364?

6 And go to the next page. And can you
7 first blow up that last column? Is it possible?

8 Could you do me a favor and just blow up
9 the whole bottom? That will be easier.

10 Q. (By Mr. Lender) Now, what I'm putting up
11 here, Mr. Wagner, is this the results of the -- of
12 the -- of the Wecker survey that you relied upon,
13 correct?

14 A. It is.

15 MR. LENDER: And if we could highlight
16 the numbers of the last column.

17 Q. (By Mr. Lender) Those top two numbers, the
18 148,000 number and the 1.6 million number, those are the
19 numbers that you relied upon, right?

20 A. If you change the 148 to 248, I would agree.

21 Q. I couldn't see the numbers from this far
22 away. Maybe I should get my own copy so I don't make
23 that mistake again.

24 A. Well, you said the second number correctly.

25 Q. Okay. So that last column, that's the column

1 for documents -- XML documents that have been opened
2 containing custom XML and saved in the dot XML, dot
3 docx, or dot docm file format, right?

4 A. Yes.

5 Q. Now, you were here when Dr. Rhyne testified
6 that people don't save in the dot doc or dot dot format
7 because it loses the advantages of custom XML.

8 Do you remember that?

9 A. Well, he does say they don't, but he says if
10 they do, they will lose the advantages of the custom
11 XML.

12 Q. In fact, he gave that testimony as the basis
13 for him saying that people wouldn't use this; it would
14 be insubstantial, right?

15 A. I believe that's true.

16 Q. Well, you know that's not true based on the
17 results of the Wecker survey, right?

18 A. I don't know that's true.

19 Q. Well, let's look at the other column right
20 next to it. The other column right next to it reports
21 people that opened an XML document containing custom XML
22 but saved it in a dot doc or dot dot format, right?

23 A. It does.

24 Q. And if we look at that column, virtually
25 every one of those numbers is actually larger than the

1 numbers that are reported in the column for saving as a
2 dot XML or a dot docx or dot docm; is that correct?

3 A. That's true.

4 Q. Thank you.

5 MR. LENDER: I have no further questions.

6 THE COURT: All right. Redirect?

7 MR. CAWLEY: Only a few questions, Your
8 Honor.

9 REDIRECT EXAMINATION

10 BY MR. CAWLEY:

11 Q. Just to start off very generally, Mr. Wagner,
12 have you been asked any questions or shown any
13 information in your cross-examination that's caused you
14 to reconsider or change your opinion about a reasonable
15 royalty in this case?

16 A. No. All of that information presented me,
17 why I was considering what my opinion would be, so I've
18 already considered all of that.

19 Q. Okay. Well, let's go over at least a few
20 points.

21 One of the first things you were shown was
22 the circle, and it was surrounded by a lot of features
23 of Microsoft Word.

24 Do you remember that?

25 A. I certainly do.

1 Q. You were asked some questions, and before it
2 was over, Microsoft's lawyer said there's thousands upon
3 thousands of features in Microsoft Word.

4 Do you remember that?

5 A. I do.

6 Q. But remind us of the importance to
7 Microsoft's business strategy, not of the features that
8 are already there, but of the new features for new
9 versions?

10 A. You know, I went over that very quickly, but
11 I believe every single feature on that sheet was already
12 in Word XP, except for possibly digital rights
13 management.

14 So most of those thousands and thousands of
15 features are irrelevant. Somebody already has that if
16 they have Word 2000 or Word XP. So they're not going to
17 make a decision to upgrade just to have the chance to
18 see the file again or to print a file or to use a
19 particular type of font. They already can do all of
20 those things.

21 So it's irrelevant to this calculation.

22 Q. Do you remember reviewing some evidence about
23 Microsoft's own statements about the importance of the
24 new XML capability in Word 2003?

25 A. In the launched document for Office 2003,

1 they stated the foremost improvement was custom XML
2 above anything else they were doing.

3 Q. Next topic: In your study of documents and
4 things in this case and hearing the testimony in this
5 case, have you heard a whole range of valuations of what
6 the value of the company, i4i, has been at various
7 times?

8 A. Yes.

9 Q. Why didn't you use those valuations as part
10 of your decision about what would be a reasonable
11 royalty?

12 A. Because not a single one of those evaluations
13 considered -- part of the value of the '449 patent was
14 to license the largest software company in the world for
15 a very important use.

16 At that point, no one at i4i thought that
17 Microsoft was going to use their technology, so there's
18 no information in those valuations that would help me
19 value this patent for this case.

20 Q. Okay. And this may be something that I just
21 misheard. I just want to make sure there's not any
22 confusion.

23 You're not saying, are you, that the
24 reasonable royalty that you determined and explained to
25 the jury would apply every time a Microsoft customer

1 used the XML functionality.

2 A. Only if they used it in an infringing
3 fashion.

4 Q. But if they use it on Monday and then use it
5 on Tuesday, is that two different royalties?

6 A. Oh, I'm sorry. No.

7 Once they've used it once, it triggers a
8 royalty. But the chances are, once someone understands
9 and uses this functionality, they're going to use it a
10 lot.

11 As an example, on that chart that Mr. Wecker
12 shows, there's a fair number of people that save and
13 appear to save in dot doc or dot dot formats. That
14 doesn't tell you how often they did it. It could have
15 been the first time they used the product, or it could
16 have been default and saved because they didn't realize
17 it was going to default to that.

18 But then the other column, which has lower
19 numbers, they could do that a thousand times.

20 Q. Okay. Just so there's no confusion, are you
21 saying that when a business buys Word 2003 or 2007 and
22 puts it on a computer and uses it to infringe, that's
23 one royalty, right?

24 A. Right. It's one royalty whether they use it
25 once or 10,000 times. It doesn't increase.

1 Q. On that computer?

2 A. That's correct.

3 Q. And if they have a second computer and they
4 get a second license to Word and put it on that computer
5 and use it to infringe, is that a second royalty?

6 A. Yes.

7 Q. No matter how many times they do it on that
8 computer?

9 A. Right. The royalty will never change.

10 Q. All right. Now, you also heard or were asked
11 some questions about Microsoft's practices out in the
12 real world in their negotiation of what they're going to
13 pay and the terms that they're going to be willing to
14 pay for patent license agreements; is that right?

15 A. That's correct.

16 Q. And you were basically informed in the
17 questioning that Microsoft dictates that it just pays a
18 lump sum, right?

19 A. That's true.

20 Q. And Microsoft dictates that it won't listen
21 to the 25-percent rule, right?

22 A. That's correct.

23 Q. Well, does Microsoft get to dictate what
24 happens here in the courtroom in the jury's
25 consideration of the hypothetical negotiation?

1 A. No. Actually, in this situation, since they
2 have to, in this hypothetical, agree that it's a valid
3 patent, if my work is relevant and that they infringe.
4 In the patent, the monopolist here is i4i. They have a
5 monopoly, according to the United States government, by
6 their patent. They're the monopolist.

7 Q. Well, let's make sure we understand that.
8 Out in the real world where Microsoft can dictate the
9 terms because of their power, when they're negotiating,
10 do they have to assume that they, in fact, are
11 infringing the patent?

12 A. No, they don't do that. In fact, they will
13 tell the person they license with, we don't practice
14 your invention. We think it's an invalid patent. We
15 will prove that if you want to fight about it.

16 So they get a discount, in effect, from the
17 licensor because of that fact.

18 Q. And out in the real world, when Microsoft is
19 behaving the way that their lawyer just described, do
20 they have to assume that the patent is valid?

21 A. No.

22 Q. How is that different from what, in this
23 courtroom, the law tells us that you are to assume and
24 everyone is to assume about the hypothetical
25 negotiation?

1 A. It gives the owner of the patent much more
2 negotiating power.

3 Q. Okay. Why don't you think a lump sum royalty
4 is appropriate here?

5 A. Because my reading of the statute that gives
6 rise to this remedy, Title 35, Section 284 of the U.S.
7 Code, says that you are to award a reasonable royalty
8 for use of the invention.

9 The best measure of the use is actually how
10 much the alleged infringer used the product. And a lump
11 sum in some situations may way overcompensate for use or
12 may way undercompensate.

13 The most accurate way to measure it is to
14 look at all of the infringing use, and I do that whether
15 I work for an infringer or I work for a patent owner
16 when I'm an expert.

17 Q. Mr. Wagner, you were asked in your
18 cross-examination about some Microsoft license
19 agreements.

20 Do they affect your opinion here?

21 A. No. I considered them, and there is some
22 relevance to them, but they did not give me what I
23 thought was real important information to consider.

24 Q. Why not?

25 A. Again, a number of them were university

1 licenses; they're not competitors. Universities license
2 at a lower rate.

3 Again, Microsoft is using its legally
4 entitled dominance in this industry to negotiate terms,
5 and I have no information that these patents were of the
6 same type of value as the patent in this lawsuit.

7 Q. Okay. You were shown a slide that I won't
8 take the time to try and retrieve, with a bunch of
9 colors on it. And it said that at least according to
10 Microsoft's lawyers, you did 23 different calculations
11 of the royalty.

12 Do you remember that?

13 A. I do.

14 Q. Now, did you have 23 different opinions?

15 A. No. They were all different calculations
16 given certain assumptions.

17 Q. What's the -- regardless of how many
18 different ways you showed that it could be sliced up, in
19 fact, you testified to the jury earlier today what you
20 think the right answer is.

21 A. Right. I gave the jury what I thought is the
22 right answer, based on the work that I've done.

23 Q. Okay. And another point: You were asked
24 about this product called XMetaL, the one that you used
25 sort of as your starting point in determining a

1 reasonable royalty.

2 Do you remember that?

3 A. I do.

4 Q. Have you read anything that Microsoft has
5 said supposedly about all these supposed valuable
6 features in XMetaL besides XML?

7 A. No. When Microsoft themselves bought the
8 product, they didn't use the word processing capability
9 of XMetaL; they don't need it.

10 They needed the custom XML feature to help
11 them have that in their work internally at Microsoft.
12 Once Microsoft got their own functionality, they didn't
13 need XMetaL anymore or any of its other features, and
14 they had what they wanted.

15 Q. All right. And when you needed to know the
16 price of XMetaL for purposes of making your
17 calculations, how did you arrive at that?

18 A. I had to go to public information. I used
19 their website to find the price.

20 Q. Okay. And near the end of your
21 cross-examination, you were asked some questions yet
22 again about the fact that i4i is a struggling company
23 and has had some financial difficulties.

24 Why have you expressed the opinion that \$207
25 million is a reasonable royalty for Microsoft's use of

1 this patent, taking into account i4i's sales and
2 profits?

3 A. Well, there is another remedy that i4i could
4 have sought here, and they could have said we have lost
5 sales because of Microsoft; we want our lost profits.
6 If I did that type of damage calculation, what they have
7 earned on the product isn't important. What's important
8 here is what Microsoft is able to earn from the
9 invention.

10 To give you an example, Mike Wagner is i4i
11 and you give me a great golf club, I guarantee it's not
12 going to be of much use in my hands. But that same
13 great golf club could be put in Microsoft's hands, and
14 they're Tiger Woods, and they're going to get a lot more
15 money with that golf club.

16 And that's what we're trying to value here,
17 not i4i's use of the invention.

18 Q. Okay. And one last topic: You remember that
19 you were reminded by Microsoft's lawyer that in some
20 products, the difference between a product that has XML
21 capability and another product that doesn't is \$50.
22 Do you remember that?

23 A. Well, and other things as well.

24 Q. Okay. Other things as well. But the
25 difference was \$50.

1 Do you remember?

2 A. I do.

3 Q. And then you were shown some calculations
4 using \$50 instead of your \$499.

5 Is that a legitimate comparison?

6 A. No. I tried to explain by saying it's not
7 logical.

8 Q. Let me give you a chance now to actually
9 explain yourself fully.

10 A. Microsoft earns \$50 from every customer who
11 buys the more expensive version and less expensive
12 version. And, of course, they want their customers to
13 do that.

14 Anyone who buys that is going to pay that
15 price. That's not the construct I'm using for this
16 reasonable royalty. I'm not looking at all the
17 customers that have the capability of infringing. If I
18 did that, the royalty rate would be \$2.

19 I'm only looking at that very narrow slice
20 that actually use it. So trying to make that 50-dollar
21 comparison is just not correct.

22 Q. Let's accept their invitation. Tell us the
23 calculation. If we follow Microsoft's lawyer's
24 suggestion and say that the value of the difference for
25 XML is \$50 for every copy that they sell to anybody,

1 you're the CPA; do the math.

2 A. That's right. I wouldn't, then, limit it to
3 the 2.1. I would look at all units sold, and the number
4 would be significantly higher.

5 I can't calculate it for you. It would be 98
6 times higher -- no, pardon me -- 50 times higher.

7 Q. Fifty times higher than the amount you've
8 asked for?

9 A. Well, the 24 million that was calculated
10 using that approach.

11 Q. Okay.

12 MR. CAWLEY: Pass the witness, Your
13 Honor.

14 THE COURT: All right. Any brief
15 redirect?

16 MR. LENDER: Very, very short. Very
17 short.

18 THE COURT: All right.

19 MR. LENDER: Chris, can you put up the
20 wheel again, the last thing?

21 REDIRECT EXAMINATION

22 BY MR. LENDER:

23 Q. This is the first slide I showed for Word
24 2003 features. And you remember we talked about this.
25 This is all the features that are included in Word 2003

1 that are not accused of infringement in this case,
2 right?

3 A. I'm sure there's many more than this, but
4 this is all you could fit on this wheel.

5 Q. Right. And I think what you said was that
6 actually all these features, other than perhaps digital
7 rights management, were included in the earlier versions
8 of Word.

9 That's what you said, right?

10 A. Well, I said that it's possible. I just read
11 this very quickly. You didn't give me a lot of time to
12 look at it.

13 Q. Okay. Well, research and reference, see that
14 one on the left there on the top?

15 That's a brand new feature included in Word
16 2003, right?

17 A. If you represent that it is, then I would
18 agree with you.

19 Q. Clear type, that's another one that's brand
20 new included in Word 2003, right?

21 A. I don't know that. You'd have to tell me
22 that.

23 Q. Reader view, another brand new one included
24 in Word 2003, right?

25 A. Again, we can do this all the way around the

1 circle. My answer is the same.

2 Q. So it's fair to say that you don't know how
3 many of the features that I included on this wheel were
4 included in Word 2003 for the very first time, right?

5 A. Only you would know that, but I can tell you,
6 saving, printing, strike through table contents, all
7 that stuff I do know, because I can do that in my
8 version of XP.

9 Q. Thank you very much.

10 THE COURT: All right. Very well.
11 May this witness step down? Are we through with this
12 witness?

13 MR. CAWLEY: Yes, Your Honor.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: All right. Ladies and
16 Gentlemen of the Jury, it's 5:00 o'clock. I believe we
17 still have a couple of witnesses for i4i to go, so we
18 should finish by 8:00 o'clock tonight, if that's all
19 right with you.

20 [Laughter.]

21 THE COURT: No. We're going to recess
22 for the evening. We'll come back on Friday morning. If
23 you come back tomorrow, you're welcome to come; I've got
24 another hearing in a completely different case, and you
25 can sit there and listen to it.

1 But if you don't want to do that, I would
2 request that you plan to be back here at 9:00 o'clock on
3 Friday morning, and we'll start back and finish up the
4 Plaintiffs' case and begin the Defendant's case. Then
5 we'll come back on Monday and proceed on in that manner.
6 Remember my instructions. You're going to be off
7 tomorrow. Enjoy your day off and don't think or worry
8 about this. Definitely don't talk about it with
9 anybody. Don't do any independent investigation.
10 And we'll see you back here on Friday morning at 9:00
11 o'clock.

12 COURT SECURITY OFFICER: All rise.

13 (Jury out.)

14 THE COURT: Please be seated.

15 All right. For the parties' information,
16 the Plaintiffs have used 8 hours and 49 minutes, and the
17 Defendant has used 5 hours and 10 minutes.

18 On Friday morning, please try to get your
19 exhibits all in shape. Let's get those offered. Y'all
20 meet and confer, as you need to, and, hopefully, there
21 won't be many objections. If there are, I'll rule on
22 them at the time they're offered.

23 Anything else I can help you with this
24 afternoon?

25 MR. CAWLEY: I don't think so, Judge.

1 Thank you.

2 MR. POWERS: Nothing for Microsoft.

3 Thank you, Your Honor.

4 THE COURT: Oh, one other thing. I do
5 have a Markman hearing in here tomorrow, and I
6 understand the attorneys are coming early in the morning
7 to try to set up. So if y'all could sort of clean up
8 your playground here, I would appreciate it.

9 We'll be in recess.

10 COURT SECURITY OFFICER: All rise.

11 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
SUSAN SIMMONS, CSR
Official Court Reporter
State of Texas No.: 267
Expiration Date: 12/31/10

Date

/s/_____
JUDITH WERLINGER, CSR
Deputy Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/10

Date